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No. 677

United States Court of Appeals

FOR THE SECOND CIRCUIT

SHAPIRO, BERNSTEIN & CO., INC., GERSHWIN PUBLISHING CORPORATION, EDWARD B. MARKS MUSIC CORPORATION, MILLER MUSIC CORPORATION, LEWIS MUSIC PUBLISHING COMPANY, INC. and MUTUAL MUSIC SOCIETY, INC.,

Plaintiffs-Appellants,

HELEN D. MILLER, Individually and as Executrix of the Estate of Alton G. Miller, Deceased,

Plaintiff,

against

SAM GOODY and PORTEM DISTRIBUTING, INC.,

Defendants-Appellees,

SIDNEY TURK and HAROLD GROSSBARDT, individually and doing business as COLONY RECORD & RADIO CENTER, COLONY RECORD & RADIO CENTER, INC., ARCADE MUSIC SHOP, INC., RIVOLI MUSIC CENTER, INC., and JOSEPH KRUG, individually and doing business as A. F. N. RECORD CO.,

Defendants.

PLAINTIFFS-APPELLANTS' APPENDIX

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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New York City.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

SHAPIRO, BERNSTEIN & CO., INC., GERSHWIN PUBLISHING CORPORATION, EDWARD B. MARKS MUSIC CORPORATION, MILLER MUSIC CORPORATION, LEWIS MUSIC PUBLISHING COMPANY, INC. and MUTUAL MUSIC SOCIETY, INC.,

Plaintiffs-Appellants,

HELEN D. MILLER, Individually and as Executrix of the Estate of Alton G. Miller, Deceased,

Plaintiff,

against

SAM GOODY and PORTEM DISTRIBUTING, INC.,

Defendants-Appellees,

SIDNEY TURK and HAROLD GROSSBARDT, individually and doing business as COLONY RECORD & RADIO CENTER, COLONY RECORD & RADIO CENTER, INC., ARCADE MUSIC SHOP, INC., RIVOLI MUSIC CENTER, INC., and JOSEPH KRUG, individually and doing business as A.F.N. RECORD, INC.,

Defendants.

Statement Under Rule 15(b).

This suit was commenced by the filing of the complaint on May 21st, 1954, in the District Court for the Southern District of New York. The names of the original parties appear in the above caption. The answer of defendant Sam Goody was filed on June 21, 1954 and the answer of defendant Portem Distributing, Inc. was filed on June 25, 1954. Neither of said defendants were arrested, and no bail was taken or property attached or arrested of either of said defendants.

Statement Under Rule 15(b)

On January 24, 1956 plaintiffs, other than Helen D. Miller et cetera, served motions for summary judgment against defendants Sam Goody and Portem Distributing, Inc., pursuant to Rule 56, F. R. C. P., for the relief demanded by said plaintiffs in the complaint against each of said defendants. On February 9, 1956, defendant Sam Goody, served cross motions for summary judgment against plaintiffs other than Helen D. Miller et cetera, pursuant to Rule 56, F. R. C. P., dismissing the complaint of said plaintiffs against said defendant. On February 10, 1956, defendant Portem Distributing, Inc. served cross motions for summary judgment against plaintiffs other than Helen D. Miller et cetera, pursuant to Rule 56, F. R. C. P., dismissing the complaint of said plaintiffs against said defendant. On March 16, 1956 the Honorable Irving R. Kaufman, District Judge, filed his opinion denying the motions of each of said plaintiffs and granting the motions of each of said defendants, and pursuant thereto judgment was entered on the same day dismissing the complaint of said plaintiffs against each of said defendants.

Plaintiffs' notice of appeal was filed on March 26, 1956 and a bond for costs on appeal was filed concurrently therewith.

The plaintiffs other than Helen D. Miller et cetera appeared by Abeles & Bernstein, defendant Sam Goody appeared by Telsey, Lowenthal, Rothenberg & Mason and defendant Portem Distributing, Inc. appeared by Raucher & Leftoff.

Complaint.

(Record pages 1 to 43)

Plaintiff Helen D. Miller, by her attorney David Mackay, for her cause of action respectfully alleges:

1. Plaintiff Helen D. Miller is a citizen of the State of California.

2. Defendants Sam Goody, Sidney Turk, Harold Grossbardt and Joseph Krug are citizens of the State of New York, and defendants Colony Record & Radio Center, Inc., Arcade Music Shop, Inc., Rivoli Music Center, Inc. and Portem Distributing, Inc. are corporations incorporated under the laws of the State of New York.

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars against each defendant.

4. Said plaintiff is the widow of the late Alton G. Miller who, prior to his death on December 15, 1944, was and continues to be commonly known and is hereinafter referred to as Glenn Miller, and the said plaintiff is the duly appointed, qualified and acting executrix of his estate, having been so appointed by order of the Surrogate's Court of the State of New Jersey, County of Bergen on or about March 18, 1946, and is the sole beneficiary of his estate.

5. Glenn Miller was a professional musician of great skill, artistry and ability as an orchestra leader, as an instrumentalist, as a composer and as an arranger of musical compositions, who developed a distinctive and unique style and manner of playing musical compositions which was and continues to be well and favorably known

to the public and associated in the public mind with him, whereby during his lifetime great popular demand existed for performances by him as an orchestra leader and instrumentalist, and great popular demand continues to exist for mechanical reproductions and phonograph records of his performances.

6. By reason of his said musical talents, performances by Glenn Miller constitute original artistic creations in which Glenn Miller held and said plaintiff now holds all the valuable property rights.

7. To preserve the international reputation and great good will of the name of Glenn Miller and the great popular demand for performances by Glenn Miller, it has been and continues to be necessary, among other things, that mechanical reproductions and phonograph records of his performances and bearing his name be of the highest technical quality, and Glenn Miller during his lifetime and said plaintiff since his death have at all times approved prior to release the technical quality of the mechanical reproduction of his performances on phonograph records manufactured and sold with their consent.

8. Commencing in 1938, Glenn Miller entered into three successive agreements with RCA Manufacturing Company, Inc., and its successor, Radio Corporation of America, corporations engaged in the manufacture and sale of phonograph records and hereinafter referred to as RCA, for the recording of performances by him of musical compositions and for the manufacture and sale of phonograph records from such recordings and granted to RCA a license to use his name and likeness in the advertising and sale of such records, in return for the payment to him or his estate of royalties based upon the sale by RCA of

such records, and upon his death RCA became obligated to pay to said plaintiff such royalties as under said agreements thereafter become due upon the sale by RCA of such records; Glenn Miller did not thereafter enter into any agreement, or grant any license, for the manufacture or sale of mechanical reproductions of his performances.

9. In 1951 said plaintiff entered into an agreement with RCA for the recording of other performances by Glenn Miller between 1938 and 1942 of musical compositions, which had been preserved from radio broadcasts on acetate discs owned by said plaintiff, and for the manufacture and sale of phonograph records from such recordings and granted to RCA a license to use the name and likeness of Glenn Miller in the advertising and sale of such records in return for the payment to said plaintiff of royalties based upon the sale by RCA of such records.

10. Under said agreements, RCA has manufactured and sold, upon information and belief, over 15,000,000 phonograph records mechanically reproducing the performances of Glenn Miller, and RCA continues to manufacture and sell such records in great numbers to satisfy the continuing great popular demand therefor and RCA has used and continues to use the name and likeness of Glenn Miller in the advertising and sale of such records, all of which records manufactured and sold by RCA have been of the highest technical quality and approved by Glenn Miller during his lifetime and by said plaintiff since his death.

11. Under said agreements, large sums as royalties were paid by RCA to Glenn Miller and since his death have been and continue to be paid by RCA to said plaintiff, such royalties paid to said plaintiff having averaged substantially in excess of $30,000 per year over the past seven

years, and by virtue of said agreements and the royalty payments to her thereunder, said plaintiff has a continuing great interest in the sale by RCA of phonograph records mechanically reproducing the performances by Glenn Miller.

12. Said plaintiff is the owner of certain acetate discs on which other performances by Glenn Miller between 1942 and 1944 of musical compositions have been preserved from radio broadcasts, which said discs from which mechanical reproductions on phonograph records may be manufactured and sold are of great value and said plaintiff has entered into an agreement with RCA for such use thereof, and for the use by RCA of the name and likeness of Glenn Miller under which plaintiff will receive substantial royalties, and said plaintiff will approve the technical quality of all phonograph records manufactured and sold from said discs prior to the release thereof.

13. By reason of the international reputation of Glenn Miller in the field of popular music and the continuing great popular demand for his performances embodied in such media as phonograph records, the right to license the use for commercial purposes of his name and likeness is a property of great value of said plaintiff; as aforesaid, in 1951 and again in 1954 said plaintiff for valuable consideration granted to RCA a license to use the name and likeness of Glenn Miller in the advertising and sale of phonograph records; in 1952 said plaintiff for valuable consideration granted to Universal Pictures Company, Inc., a corporation engaged in the production and distribution of sound motion pictures, a license to use the name and likeness of Glenn Miller in the production, advertising and distribution of a sound motion picture based upon the

life of Glenn Miller; in 1951 said plaintiff for valuable consideration granted to Miller Transcriptions, Inc., a corporation engaged in the marketing of transcriptions for radio broadcast purposes, a license to use the name of Glenn Miller in the marketing for radio broadcast purposes of certain transcriptions of the performances of Glenn Miller; in 1954 said plaintiff for valuable consideration granted to Charles H. Hansen Music Corp., a corporation engaged in the publication and sale of printed music, a license to use the name and likeness of Glenn Miller in the sale of printed folios of music, arranged in the Glenn Miller style for use by concert and symphony orchestras; whereby said plaintiff receives substantial royalties from RCA, Universal Pictures Company, Inc., Miller Transcriptions, Inc. and Charles H. Hansen Music Corp. under the aforesaid licenses and said plaintiff reasonably expects that she will receive additional valuable consideration from others wishing to use the name and likeness of Glenn Miller for commercial purposes in various fields of endeavor.

14. Within the past three years defendant Joseph Krug has manufactured, distributed, vended, sold and otherwise marketed, or caused others to manufacture, distribute, vend, sell and otherwise market phonograph records made from recordings of radio broadcasts of performances by Glenn Miller between 1942 and 1944, the labels of which bear the name of Glenn Miller and the legend "An A.F.N. Presentation" and the jackets of which bear both the name and likeness of Glenn Miller and the legend "An A.F.N. Presentation", hereinafter referred to as the A.F.N. records.

15. The lettering "A.F.N.", on the labels and jackets of the A.F.N. records, has reference to the business con-

ducted by defendant Joseph Krug under the name of A.F.N. Record Co.

16. The jackets of the A.F.N. records likewise bear the legend:

> "Despite the formation of at least a dozen so called 'Miller-styled' orchestras, the sounds and style have remained unique to the Miller-led orchestras. Not since the tragic death of Major Miller has any one man or orchestra captured the public as Glenn Miller did in 1939, and even today the Miller records, all popular standards, rank as the best sellers in the dance band field. In these two volumes we are proud to present the last recordings made by a Miller-led orchestra. These recordings were taken from propaganda broadcasts made in London and beamed directly at the German soldiers."

17. The technical quality of the A.F.N. records is poor and far below the standards set by Glenn Miller and by said plaintiff.

18. Within the past three years the other defendants have distributed, vended, sold or otherwise marketed the A.F.N. Records.

19. Defendant Joseph Krug has manufactured, distributed, vended, sold and otherwise marketed, or caused others to manufacture, distribute, vend, sell or otherwise market the A.F.N. records and the other defendants have distributed, vended, sold or otherwise marketed the A.F.N. records, well knowing of the valuable rights of said plaintiff, as aforesaid.

20. The A.F.N. records mechanically reproduce performances by Glen Miller of copyrighted musical works of various music publishers including the following:

Name of Publisher	*Title of Composition*
Shapiro, Bernstein & Co., Inc.	"In the Mood"
Gershwin Publishing Corporation	"Summertime"
Edward B. Marks Music Corporation	"Poinciana"
Miller Music Corporation	"Great Day"
Lewis Music Publishing Company, Inc.	"Tuxedo Junction"
Mutual Music Society, Inc.	"American Patrol"
Mutual Music Society, Inc.	"Song of the Volga Boatman"
Mutual Music Society, Inc.	"Anvil Chorus"
Mutual Music Society, Inc.	"A String of Pearls"

21. Glenn Miller did not authorize or consent to and said plaintiff has not authorized or consented to the recording for commercial purposes of the performances by Glenn Miller which are embodied in the A.F.N. records, to the manufacture, distribution, vending, sale or marketing of the A.F.N. records, or to the use of the name or likeness of Glenn Miller in connection therewith, and Glenn Miller did not receive and said plaintiff has not received any compensation therefor.

22. Said plaintiff gave written notice to defendants that such acts on their part violated her aforesaid rights, and although certain of defendants thereafter gave assurances to said plaintiff that they would cease such acts on their part, A.F.N. records have been and continue to be manufactured, distributed, vended, sold and otherwise marketed

by defendants in direct competition with the phonograph records reproducing the performances of Glenn Miller manufactured and sold by RCA from which said plaintiff has received and continues to receive large sums as royalties, and defendants have thereby been engaging in unfair trade practices and unfair competition against said plaintiff to said plaintiff's irreparable damage.

23. By reason of the poor technical quality and low standard of the A.F.N. records, the manufacture, distribution, vending, sale and marketing thereof by defendants wrongfully has endangered and impaired the reputation and good will of the Glenn Miller name, the popular demand for phonograph records reproducing the performances of Glenn Miller, the sale by RCA of such records, said plaintiff's royalties therefrom, and said plaintiff's valuable property in the acetate discs owned by her from which phonograph records reproducing the performances of Glenn Miller may be manufactured and sold.

24. By such acts on their part defendants have wrongfully appropriated, interfered with and infringed said plaintiff's valuable property rights in the performance of Glenn Miller embodied in the A.F.N. records and said plaintiff's valuable property right to license the recording and reproduction of Glenn Miller performances.

25. Such use by defendants of the name and likeness of Glenn Miller wrongfully has appropriated, interfered with and infringed said plaintiff's valuable property in the right to license the use thereof for commercial purposes.

26. Unless enjoined by this Court, the manufacture, distribution, vending, sale and marketing by defendants of the A.F.N. records and the use by defendants of the Glenn Miller name and likeness in connection therewith

will cause said plaintiff further immediate, substantial and irreparable injury.

27. Said plaintiff has no adequate remedy at law.

Plaintiffs, Shapiro Bernstein & Co., Inc., Gershwin Publishing Corporation, Edward B. Marks Music Corporation, Miller Music Corporation, Lewis Music Publishing Company, Inc. and Mutual Music Society, Inc., by their attorneys, Abeles & Bernstein, for their respective causes of action, respectfully allege:

FOR THE CAUSE OF ACTION OF PLAINTIFF, SHAPIRO, BERNSTEIN & CO., INC.

28. The action arises under the Act of March 4, 1909, c. 320, 35 Stat. 1075 *et seq.*, U. S. C. Title 17, and the amendments thereto, as codified and enacted into positive law by the Act of July 30, 1947, c. 391, 61 Stat. 652, and the amendments thereto, and the Act of June 25, 1948, c. 646, 62 Stat. 931, U. S. C. Title 28, Sec. 1338, as hereinafter more fully appears.

29. Plaintiff, SHAPIRO, BERNSTEIN & CO., INC., is a corporation incorporated under the laws of the State of New York.

30. Defendants SAM GOODY, SIDNEY TURK, HAROLD GROSSBARDT and JOSEPH KRUG are citizens of the State of New York, and defendants COLONY RECORD & RADIO CENTER, INC., ARCADE MUSIC SHOP, INC., RIVOLI MUSIC CENTER, INC. and PORTEM DISTRIBUTING, INC. are corporations incorporated under the laws of the State of New York.

31. Prior to November 26, 1938, Joe Garland, also known as Joe C. Garland, who then was and ever since has

been a citizen of the United States, created and wrote an original musical composition entitled "IN THE MOOD."

32. This musical composition contains a large amount of material wholly original with said Joe Garland and is copyrightable subject matter under the laws of the United States.

33. Prior to November 26, 1938, said Joe Garland duly assigned to Lewis Music Publishing Company, Inc., a music publisher, said musical composition and the right to secure copyright therefor in its name.

34. On November 26, 1938, said Lewis Music Publishing Company, Inc. duly complied in all respects with the said Act of March 4, 1909 et cetera and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said musical composition as an unpublished work and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "Nov. 26, 1938, Class E, unp., No. 181388."

35. On October 9, 1939, said Lewis Music Publishing Company, Inc., by an instrument in writing duly recorded in the copyright office on October 11, 1939, duly assigned to plaintiff SHAPIRO, BERNSTEIN & CO., INC., a music publisher, said musical composition and the said copyright thereof.

36. Prior to November 27, 1939, Andy Razaf, who then was and ever since has been a citizen of the United States, with the consent and for and on behalf of said plaintiff as the proprietor of the copyright in said musical composition and in collaboration with said Joe Garland, produced,

created and wrote a new and original version of said musical composition likewise entitled "IN THE MOOD."

37. This version of said musical composition contains a large amount of material wholly original with said Andy Razaf and is copyrightable subject matter as a new work under the laws of the United States.

38. Prior to November 27, 1939, said Andy Razaf duly assigned to said plaintiff all of his rights, title and interest in and to said version of said musical composition and the right to secure copyright thereof in its name.

39. Between November 26, 1939 and January 24, 1940, said plaintiff duly complied in all respects with the said Act of March 4, 1909 et cetera and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said version of said musical composition as a published new work, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "Jan. 23, 1940, Class E, pub., No. 82707."

40. Since November 27, 1939, said version of said musical composition has been published by said plaintiff and all copies of it made by it or under its authority or license have been printed, published and offered for sale in strict conformity with the provisions of the said Act of March 4, 1909 et cetera and all other laws governing copyright.

41. Since November 27, 1939, said plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the said copyrights.

42. Said Lewis Music Publishing Company, Inc. or said plaintiff not having theretofore used said copyrighted

musical composition or version thereof for the manufacture of parts of instruments serving to reproduce the same mechanically but said plaintiff having licensed others to do so did thereupon duly file notice thereof, accompanied by a recording fee, in the copyright office of the United States, in strict conformity with the provisions of the said Act of March 4, 1909 et cetera, and all other laws governing copyright.

43. After November 27, 1939 defendant JOSEH KRUG manufactured, distributed, vended, placed upon the market and sold, or caused others to manufacture, distribute, vend, place upon the market and sell parts of instruments, serving to reproduce mechanically said copyrighted musical composition and version thereof, made from a recording of a radio broadcast of a performance thereof by an orchestra conducted by Glenn Miller, the labels of which bear the name of Glenn Miller and the legend "An A.F.N. Presentation" and the jackets of which bear both the name and likeness of Glenn Miller and likewise the legend "An A.F.N. Presentation."

44. After November 27, 1939, the other defendants distributed, vended, placed upon the market or sold such parts of instruments serving to reproduce mechanically said copyrighted musical composition and version thereof.

45. Defendant Joseph Krug never served notice upon said plaintiff, by registered mail or otherwise, of his intention to use said copyrighted musical composition or verson thereof upon the parts of instruments serving to reproduce the same mechanically, under the compulsory license provision of the said Act of March 4, 1909 et cetera.

46. Defendant Joseph Krug thereby infringed said copyrights, in that such acts on his part were without any authorization, permission, consent or license.

47. The other defendants thereby infringed said copyrights in that such acts on their part were without any authorization, permission, consent or license.

48. A copy of said plaintiff's copyrighted version of said musical composition is hereto annexed as "Exhibit 1", said plaintiff's original copyrighted musical composition being the same as said version without words; and while no copies of defendants' infringements are attached because of their fragile nature, copies thereof will be proffered to the Court upon the trial of this action.

49. Defendants have been notified that defendants have infringed the said copyrights, and defendants have continued to infringe the copyrights.

50. Since some time subsequent to November 21, 1939, defendants have been continuously manufacturing, distributing, vending or selling or otherwise marketing, under the said title "IN THE MOOD", parts of instruments serving to reproduce mechanically the said copyrighted musical composition and version of said plaintiff, and have thereby been engaging in unfair trade practices and unfair competition against said plaintiff to said plaintiff's irreparable damage.

FOR THE CAUSE OF ACTION OF PLAINTIFF, GERSHWIN PUBLISHING CORPORATION

51. Repeats and realleges each and every allegation contained in paragraph marked and numbered "28" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

52. Plaintiff, Gershwin Publishing Corporation, is a corporation incorporated under the laws of the State of New-York.

53. Repeats and realleges each and every allegation contained in paragraph marked and numbered "30" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

54. Prior to September 28, 1935, George Gershwin and Du Bose Heyward, each of whom then was and ever since has been a citizen of the United States, created and wrote an original musical composition entitled "Summertime".

55. This musical composition contains a large amount of material wholly original with said George Gershwin and Du Bose Heyward and is copyrightable subject matter under the laws of the United States.

56. Prior to September 28, 1935, said Du Bose Heyward assigned to said George Gershwin all of his rights, title and interest in and to said musical composition and the right to secure copyright therefor in his name.

57. Between September 27, 1935 and October 4, 1935 said George Gershwin duly complied in all respects with the said Act of March 4, 1909 et cetera and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said musical composition as a published work, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "Oct. 3, 1935, Class E, pub., No. 50655".

58. Said George Gershwin having thereafter died intestate, on May 1, 1942 Rose Gershwin, as administratrix of his estate, by an instrument in writing duly recorded in the copyright office on January 13, 1943, duly assigned to plaintiff Gershwin Publishing Corporation, a music publisher, said musical composition and the said copyright thereof.

59. Since September 28, 1935, said musical composition has been published by said George Gershwin and said plaintiff and all copies of it made by them or under their authority or license have been printed, published and offered for sale in strict conformity with the provisions of the said Act of March 4, 1909 et cetera, and all other laws governing copyright.

60. Since May 1, 1942, said plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the said copyright.

61. Said George Gershwin or said plaintiff not having theretofore used said copyrighted musical composition for the manufacture of parts of instruments serving to reproduce the same mechanically but said plaintiff having licensed others to do so did thereupon duly file notice thereof, accompanied by a recording fee, in the copyright office of the United States, in strict conformity with the provisions of the said Act of March 4, 1909, et cetera, and all other laws governing copyright.

62. After May 1, 1942 defendant Joseph Krug manufactured, distributed, vended, placed upon the market and sold, or caused others to manufacture, distribute, vend, place upon the market and sell parts of instruments, serving to reproduce mechanically said copyrighted musical composition and version thereof, made from a recording of a radio broadcast of a performance thereof by an orchestra conducted by Glenn Miller, the labels of which bear the name of Glenn Miller and the legend "An A.F.N. Presentation" and the jackets of which bear both the name and likeness of Glenn Miller and likewise the legend "An A.F.N. Presentation".

63. After May 1, 1942, the other defendants distributed, vended, placed upon the market or sold such parts of

instruments serving to reproduce mechanically said copyrighted musical composition and version thereof.

64. Defendant Joseph Krug has never served notice upon said plaintiff, by registered mail or otherwise, of his intention to use said copyrighted musical composition upon the parts of instruments serving to reproduce the same mechanically, under the compulsory license provision of the said Act of March 4, 1909, et cetera.

65. Defendant Joseph Krug thereby infringed said copyright, in that such acts on his part were without any authorization, permission, consent or license.

66. The other defendants thereby infringed said copyright in that such acts on their part were without any authorization, permission, consent or license.

67. A copy of said plaintiff's copyrighted musical composition is hereto annexed as "Exhibit 2"; and while no copies of defendants' infringement are attached because of their fragile nature, copies thereof will be proffered to the Court upon the trial of this action.

68. Defendants have been notified that defendants have infringed the said copyright, and defendants have continued to infringe the copyright.

69. Since some time subsequent to May 1, 1942, defendants have been continuously manufacturing, distributing, vending or selling or otherwise marketing, under the said title "SUMMERTIME", parts of instruments serving to reproduce mechanically said copyrighted musical compositions of said plaintiff, and have thereby been engaging in unfair trade practices and unfair competition against said plaintiff to said plaintiff's irreparable damage.

Complaint.

FOR THE CAUSE OF ACTION OF PLAINTIFF, EDWARD B. MARKS MUSIC CORPORATION

70. Repeats and realleges each and every allegation contained in paragraph marked and numbered "28" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

71. Plaintiff, Edward B. Marks Music Co. Inc. is a corporation incorporated under the laws of the State of New York.

72. Repeats and realleges each and every allegation contained in paragraph marked and numbered "30" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

73. Prior to June 22, 1926, Buddy Bernier and Nat Simon, each of whom then was and ever since has been a citizen of the United States, created and wrote an original musical composition entitled "POINCIANA":

74. This musical composition contains a large amount of material wholly original with said Buddy Bernier and Nat Simon and is copyrightable subject matter under the laws of the United States.

75. Prior to June 22, 1936, said Buddy Bernier and Nat Simon duly assigned to said plaintiff, a music publisher, said musical composition and the right to secure copyright therefor in its name.

76. Between June 21, 1936 and June 24, 1936, said plaintiff duly complied in all respects with the said Act of March 4, 1909 et cetera and all other laws governing copyright, and secured the exclusive rights and privileges

in and to the copyright of said musical composition as a published work, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "June 23, 1936, Class E, pub. No. 55932".

77. Since June 22, 1936, said musical composition has been published by said plaintiff and all copies of it made by it or under its authority or license have been printed, published and offered for sale in strict conformity with the provisions of the said Act of March 4, 1909 et cetera and all other laws governing copyright.

78. Since June 22, 1936, said plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the said copyright.

79. Said plaintiff itself not having theretofore used said copyrighted musical composition for the manufacture of parts of instruments serving to reproduce the same mechanically but having licensed others to do so did thereupon duly file notice thereof, accompanied by a recording fee, in the copyright office of the United States, in strict conformity with the provisions of the said Act of March 4, 1909 et cetera, and all other laws governing copyright.

80. After June 22, 1936 defendant Joseph Krug manufactured, distributed, vended, placed upon the market and sold, or caused others to manufacture, distribute, vend, place upon the market and sell parts of instruments, serving to reproduce mechanically said copyrighted musical composition and version thereof, made from a recording of a radio broadcast of a performance thereof by an orchestra conducted by Glenn Miller, the labels of which bear the name of Glenn Miller and the legend "An A.F.N. Presentation" and the jackets of which bear both the name and likeness of Glenn Miller and likewise the legend "An A.F.N. Presentation".

81. After June 22, 1936, the other defendants distributed, vended, placed upon the market or sold such parts of instruments serving to reproduce mechanically said copyrighted musical composition and version thereof.

82. Defendant Joseph Krug has never served notice upon said plaintiff, by registered mail or otherwise, of his intention to use said copyrighted musical composition upon the parts of instruments serving to reproduce the same mechanically, under the compulsory license provision of the said Act of March 4, 1909 et cetera.

83. Defendant Joseph Krug thereby infringed said copyright, in that such acts on his part were without any authorization, permission, consent or license.

84. The other defendants thereby infringed said copyright in that such acts on their part were without any authorization, permission, consent or license.

85. A copy of said plaintiff's copyrighted musical composition is hereto annexed as "Exhibit 3"; and while no copies of defendants' infringement are attached because of their fragile nature, copies thereof will be proffered to the Court upon the trial of this action.

86. Defendants have been notified that defendants have infringed the said copyright, and defendants have continued to infringe the copyright.

87. Since some time subsequent to June 22, 1936, defendants have been continuously manufacturing, distributing, vending, or selling or otherwise marketing, under the said title "Poinciana", parts of instruments serving to reproduce mechanically said copyrighted musical composition of said plaintiff, and have thereby been engaging in

unfair trade practices and unfair competition against said plaintiff to said plaintiff's irreparable damage.

FOR THE CAUSE OF ACTION OF PLAINTIFF, MILLER MUSIC CORPORATION

88. Repeats and realleges each and every allegation contained in paragraph marked and numbered "28" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

89. Plaintiff, Miller Music Corporation, is a corporation incorporated under the laws of the State of New York.

90. Repeats and realleges each and every allegation contained in paragraph marked and numbered "30" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

91. Prior to June 22, 1929, William Rose, Edward Eliscu and Vincent Youmans, each of whom then was and ever since has been a citizen of the United States, created and wrote an original musical composition entitled "GREAT DAY".

92. This musical composition contains a large amount of material wholly original with said William Rose, Edward Eliscu and Vincent Youmans and is copyrightable subject matter under the laws of the United States.

93. Prior to June 22, 1929, said William Rose, Edward Eliscu and Vincent Youmans duly assigned to Vincent Youmans Inc., a music publisher, said musical composition and the right to secure copyright therefor in its name.

94. Between June 21, 1929 and June 26, 1929 said Vincent Youmans Inc. duly complied in all respects with

the said Act of March 4, 1909 et cetera and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said musical composition as a published work, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "June 25, 1929, Class E, pub., No. 7048".

95. On March 16, 1932, and pursuant to an agreement in writing between said Vincent Youmans, Inc., Vincent Youmans and plaintiff Miller Music Corporation (having the then corporate title of Miller Music, Inc.) dated March 16, 1932, said Vincent Youmans, Inc., by an instrument in writing duly recorded in the copyright office on October 11, 1932, duly assigned to said plaintiff, a music publisher, a one-half interest in and to said musical composition and the said copyright thereof, and the sole and exclusive mechanical reproduction rights therein and thereto.

96. Since June 22, 1929, said musical composition has been published by said Vincent Youmans, Inc. and said plaintiff and all copies of it made by them or under their authority or license have been printed, published and offered for sale in strict conformity with the provisions of the said Act of March 4, 1909, et cetera and all other laws governing copyright.

97. Since March 16, 1932, said plaintiff has been and still is the proprietor of a one-half interest in and to the said copyright and the sole proprietor of all mechanical reproduction rights therein and thereto.

98. Said Vincent Youmans, Inc. itself not having theretofore used said copyrighted musical composition for the manufacture of parts of instruments serving to reproduce

the same mechanically but having licensed others to do so did thereupon and prior to March 16, 1932 duly file notice thereof, accompanied by a recording fee, in the copyright office of the United States, in strict conformity with the provisions of the said Act of March 4, 1909 et cetera, and all other laws governing copyright.

99. After March 16, 1932 defendant Joseph Krug manufactured, distributed, vended, placed upon the market and sold, or caused others to manufacture, distribute, vend, place upon the market and sell parts of instruments, serving to reproduce mechanically said copyrighted musical composition and version thereof, made from a recording of a radio broadcast of a performance thereof by an orchestra conducted by Glenn Miller, the labels of which bear the name of Glenn Miller and the legend "An A.F.N. Presentation" and the jackets of which bear both the name and likeness of Glenn Miller and likewise the legend "An A.F.N. Presentation."

100. After March 16, 1932, the other defendants distributed, vended, placed upon the market or sold such parts of instruments serving to reproduce mechanically said copyrighted musical composition and version thereof.

101. Defendant Joseph Krug has never served notice upon said Vincent Youmans, Inc. or said plaintiff, by registered mail or otherwise, of his intention to use said copyrighted musical composition upon the parts of instruments serving to reproduce the same mechanically, under the compulsory license provision of the said Act of March 4, 1909 et cetera.

102. Defendant Joseph Krug thereby infringed said copyright, in that such acts on his part were without any authorization, permission, consent or license.

103. The other defendants thereby infringed said copyright in that such acts on their part were without any authorization, permission, consent or license.

104. A copy of said plaintiff's copyrighted musical composition is hereto annexed as "Exhibit 4"; and while no copies of defendants' infringement are attached because of their fragile nature, copies thereof will be proffered to the Court upon the trial of this action.

105. Defendants have been notified that defendants have infringed the said copyright, and defendants have continued to infringe the copyright.

106. Since some time subsequent to March 16, 1932, defendants have been continuously manufacturing, distributing, vending or selling or otherwise marketing, under the said title "GREAT DAY", parts of instruments serving to reproduce mechanically said copyrighted musical composition of said plaintiff, and have thereby been engaging in unfair trade practices and unfair competition against said plaintiff to said plaintiff's irreparable damage.

FOR THE CAUSE OF ACTION OF PLAINTIFF, LEWIS MUSIC PUBLISHING COMPANY, INC.

107. Repeats and realleges each and every allegation contained in paragraph marked and numbered "28" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

108. Plaintiff, Lewis Music Publishing Company, Inc., is a corporation incorporated under the laws of the State of New York.

109. Repeats and realleges each and every allegation contained in paragraph marked and numbered "30" of

the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

110. Prior to December 11, 1939, Erskine Hawkins, William Johnson and Julian Dash, each of whom then was and ever since has been a citizen of the United States, created and wrote an original musical composition entitled "TUXEDO JUNCTION."

111. This musical composition contains a large amount of material wholly original with said Erskine Hawkins, William Johnson and Julian Dash and is copyrightable subject matter under the laws of the United States.

112. Prior to December 11, 1939, said Erskine Hawkins, William Johnson and Julian Dash duly assigned to said plaintiff, a music publisher, said musical composition and the right to secure copyright therefor in its name.

113. On December 11, 1939, said plaintiff duly complied in all respects with the said Act of March 4, 1909 et cetera and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said musical composition as an unpublished work and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "December 11, 1939, Class E., unp., No. 210582."

114. Prior to February 16, 1940, Buddy Feyne, who then was and ever since has been a citizen of the United States, with the consent and for and on behalf of said plaintiff as the proprietor of the copyright in said musical composition and in collaboration with said Erskine Hawkins, William Johnson and Julian Dash, produced, created and wrote a new and original version of said musical composition likewise entitled "TUXEDO JUNCTION."

Complaint.

115. This version of said musical composition contains a large amount of material wholly original with said Buddy Feyne and is copyrightable subject matter as a new work under the laws of the United States.

116. Prior to February 16, 1940, said Buddy Feyne duly assigned to said plaintiff all of his rights, title and interest in and to said version of said musical composition and the right to secure copyright thereof in its name.

117. Between February 15, 1940 and February 22, 1940, said plaintiff duly complied in all respects with the said Act of March 4, 1909 et cetera and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said version of said musical composition as a published new work, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "Feb. 16, 1940, Class E, pub. No. 83133."

118. Since February 21, 1940, said version of said musical composition has been published by said plaintiff and all copies of it made by it or under its authority or license have been printed, published and offered for sale in strict conformity with the provisions of the said Act of March 4, 1909 et cetera and all other laws governing copyright.

119. Since February 21, 1940, said plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the said copyrights.

120. Said plaintiff itself not having theretofore used said copyrighted musical composition or version thereof for the manufacture of parts of instruments serving to reproduce the same mechanically but having licensed others to do so did thereupon duly file notice thereof,

accompanied by a recording fee, in the copyright office of the United States, in strict conformity with the provisions of the said Act of March 4, 1909 et cetera, and all other laws governing copyright.

121. After February 21, 1940 defendant Joseph Krug manufactured, distributed, vended, placed upon the market and sold, or caused others to manufacture, distribute, vend, place upon the market and sell parts of instruments, serving to reproduce mechanically said copyrighted musical composition and version thereof, made from a recording of a radio broadcast of a performance thereof by an orchestra conducted by Glenn Miller, the labels of which bear the name of Glenn Miller and the legend "An A.F.N. Presentation" and the jackets of which bear both the name and likeness of Glenn Miller and likewise the legend "An A.F.N. Presentation."

122. After February 21, 1940, the other defendants distributed, vended, placed upon the market or sold such parts of instruments serving to reproduce mechanically said copyrighted musical composition and version thereof.

123. Defendant Joseph Krug has never served notice upon said plaintiff, by registered mail or otherwise, of his intention to use said copyrighted musical composition or version thereof upon the parts of instruments serving to reproduce the same mechanically, under the compulsory license provision of the said Act of March 4, 1909 et cetera.

124. Defendant Joseph Krug thereby infringed said copyrights, in that such acts on his part were without any authorization, permission, consent or license.

125. The other defendants thereby infringed said copyrights in that such acts on their part were without any authorization, permission, consent or license.

126. A copy of said plaintiff's copyrighted version of said musical composition is hereto annexed as "Exhibit 5", said plaintiff's original copyrighted musical composition being the same as said version without words; and while no copies of defendants' infringement are attached because of their fragile nature, copies thereof will be proffered to the Court upon the trial of this action.

127. Defendants have been notified that defendants have infringed the said copyrights, and defendants have continued to infringe the copyrights.

128. Since some time subsequent to February 21, 1940, defendants have been continuously manufacturing, distributing, vending, or selling or otherwise marketing, under the said title "TUXEDO JUNCTION", parts of instruments serving to reproduce mechanically said musical composition and version of said plaintiff, and have thereby been engaging in unfair trade practices and unfair competition against said plaintiff to said plaintiff's irreparable damage.

FOR THE CAUSES OF ACTION OF PLAINTIFF, MUTUAL MUSIC SOCIETY, INC.

FOR A FIRST CAUSE OF ACTION:

129. Repeats and realleges each and every allegation contained in paragraph marked and numbered "28" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

130. Plaintiff, Mutual Music Society, Inc., is a corporation incorporated under the laws of the State of New York.

131. Repeats and realleges each and every allegation contained in paragraph marked and numbered "30" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

132. Prior to May 18, 1942, Jerry Gray, who then was and ever since has been a citizen of the United States, produced, created and wrote, a new and original arrangement and version entitled "AMERICAN PATROL", of the musical composition of the same title in the public domain.

133. This arrangement and version of said musical composition contains a large amount of material wholly original with said Jerry Gray and is copyrightable subject matter as a new work under the laws of the United States.

134. Prior to May 18, 1942, said Jerry Gray duly assigned to said plaintiff, a music publisher, all of his rights, title and interest in and to said arrangement and version of said musical composition and the right to secure copyright therefor in its name.

135. Between May 17, 1942 and May 20, 1942, said plaintiff duly complied in all respects with the said Act of March 4, 1909 et cetera and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said arrangement and version of said musical composition as a published new work, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "May 19, 1942, Class E, pub. No. 104615."

136. Since May 18, 1942, said copyrighted arrangement and version of said musical composition has been published by said plaintiff and all copies of it made by it or under its authority or license have been printed, published and offered for sale in strict conformity with the provisions

of the said Act of March 4, 1909 et cetera and all other laws governing copyright.

137. Since May 18, 1942, said plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the said copyright.

138. Said plaintiff itself not having theretofore used said copyrighted arrangement and version of said musical composition for the manufacture of parts of instruments serving to reproduce the same mechanically but having licensed others to do so did thereupon duly file notice thereof, accompanied by a recording fee, in the copyright office of the United States, in strict conformity with the provisions of the said Act of March 4, 1909 et cetera, and all other laws governing copyright.

139. After May 18, 1942 defendant Joseph Krug manufactured, distributed, vended, placed upon the market and sold, or caused others to manufacture, distribute, vend, place upon the market and sell parts of instruments, serving to reproduce mechanically said copyrighted musical composition and version thereof, made from a recording of a radio broadcast of a performance thereof by an orchestra conducted by Glenn Miller, the labels of which bear the name of Glenn Miller and the legend "An A.F.N. Presentation" and the jackets of which bear both the name and likeness of Glenn Miller and likewise the legend "An A.F.N. Presentation."

140. After May 18, 1942, the other defendants distributed, vended, placed upon the market or sold such parts of instruments serving to reproduce mechanically said copyrighted musical composition and version thereof.

141. Defendant Joseph Krug has never served notice upon said plaintiff, by registered mail or otherwise, of his

intention to use said copyrighted arrangement and version of said musical composition upon the parts of instruments serving to reproduce the same mechanically, under the compulsory license provision of the said Act of March 4, 1909 et cetera.

142. Defendant Joseph Krug thereby infringed said copyright, in that such acts on his part were without any authorization, permission, consent or license.

143. The other defendants thereby infringed said copyright in that such acts on their part were without any authorization, permission, consent or license.

144. A copy of said plaintiff's copyrighted arrangement and version of said musical composition is hereto annexed as "Exhibit 6"; and while no copies of defendants' infringement are attached because of their fragile nature, copies thereof will be proffered to the Court upon the trial of this action.

145. Defendants have been notified that defendants have infringed the said copyright and defendants have continued to infringe the copyright.

146. Since some time subsequent to May 18, 1942, defendants have been continuously manufacturing, distributing, vending, or selling or otherwise marketing, under the said title "AMERICAN PATROL" parts of instruments serving to reproduce mechanically said copyrighted arrangement and version of said musical composition of said plaintiff, and have thereby been engaging in unfair trade practices and unfair competition against said plaintiff to said plaintiff's irreparable damage.

FOR A SECOND CAUSE OF ACTION:

147. Repeats and realleges each and every allegation contained in paragraph marked and numbered "28" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

148. Plaintiff, Mutual Music Society, Inc., is a corporation incorporated under the laws of the State of New York.

149. Repeats and realleges each and every allegation contained in paragraph marked and numbered "30" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

150. Prior to December 16, 1940, William Finegan, also known as Bill Finegan, who then was and ever since has been a citizen of the United States, produced, created and wrote, a new and original arrangement and version entitled "SONG OF THE VOLGA BOATMAN", of the musical composition of the same title in the public domain.

151. This arrangement and version of said musical composition contains a large amount of material wholly original with said William Finegan and is copyrightable subject matter as a new work under the laws of the United States.

152. Prior to December 16, 1940, said William Finegan duly assigned to said plaintiff, a music publisher, all of his rights, title and interest in and to said arrangement and version of said musical composition and the right to secure copyright therefor in its name.

153. On December 16, 1940, said plaintiff duly complied in all respects with the said Act of March 4, 1909

et cetera and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said arrangement and version of said musical composition as an unpublished new work and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "Dec. 16, 1940, Class E, unp. No. 239723."

154. Between March 16, 1941 and March 20, 1941, said plaintiff duly complied in all respects with the said Act of March 4, 1909 et cetera and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said arrangement and version of said musical composition as a published new work, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "Mar. 19, 1941, Class E, pub. No. 93386".

155. Since March 17, 1941, said copyrighted arrangement and version of said musical composition has been published by said plaintiff and all copies of it made by it or under its authority or license have been printed, published and offered for sale in strict conformity with the provisions of the said Act of March 4, 1909 et cetera and all other laws governing copyright.

156. Since March 17, 1941, said plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the said copyrights.

157. Said plaintiff itself not having theretofore used said copyrighted arrangement and version of said musical composition for the manufacture of parts of instruments serving to reproduce the same mechanically but having licensed others to do so did thereupon duly file notice thereof, accompanied by a recording fee, in the copyright

office of the United States, in strict conformity with the provisions of the said Act of March 4, 1909 et cetera, and all other laws governing copyright.

158. After March 17, 1941 defendant Joseph Krug manufactured, distributed, vended, placed upon the market and sold, or caused others to manufacture, distribute, vend, place upon the market and sell parts of instruments, serving to reproduce mechanically said copyrighted musical composition and version thereof, made from a recording of a radio broadcast of a performance thereof by an orchestra conducted by Glenn Miller, the labels of which bear the name of Glenn Miller and the legend "An A.F.N. Presentation" and the jackets of which bear both the name and likeness of Glenn Miller and likewise the legend "An A.F.N. Presentation".

159. After March 17, 1941, the other defendants distributed, vended, placed upon the market or sold such parts of instruments serving to reproduce mechanically said copyrighted musical composition and version thereof.

160. Defendant Joseph Krug has never served notice upon said plaintiff, by registered mail or otherwise, of his intention to use said copyrighted arrangement and version of said musical composition upon the parts of instruments serving to reproduce the same mechanically, under the compulsory license provision of the said Act of March 4, 1909 et cetera.

161. Defendant Joseph Krug thereby infringed said copyrights, in that such acts on his part were without any authorization, permission, consent or license.

162. The other defendants thereby infringed said copyrights in that such acts on their part were without any authorization, permission, consent or license.

163. A copy of said plaintiff's copyrighted arrangement and version of said musical composition is hereto annexed as "Exhibit 7"; and while no copies of defendants' infringement are attached because of their fragile nature, copies thereof will be proffered to the Court upon the trial of this action.

164. Defendants have been notified that defendants have infringed the said copyrights, and defendants have continued to infringe the copyrights.

165. Since some time subsequent to March 17, 1941, defendants have been continuously manufacturing, distributing, vending, or selling or otherwise marketing, under the said title "SONG OF THE VOLGA BOATMAN", parts of instruments serving to reproduce mechanically said arrangement and version and of said musical composition of said plaintiff, and have thereby been engaging in unfair trade practices and unfair competition against said plaintiff to said plaintiff's irreparable damage.

FOR A THIRD CAUSE OF ACTION:

166. Repeats and realleges each and every allegation contained in paragraph marked and numbered "28" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

167. Plaintiff, Mutual Music Society, Inc., is a corporation incorporated under the laws of the State of New York.

168. Repeats and realleges each and every allegation contained in paragraph marked and numbered "30" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

169. Prior to October 15, 1940, Jerry Gray, who then was and ever since has been a citizen of the United States, produced, created and wrote, a new and original arrangement and version entitled "ANVIL CHORUS", of the musical composition of the same title in the public domain.

170. This arrangement and version of said musical composition contains a large amount of material wholly original with said Jerry Gray and is copyrightable subject matter as a new work under the laws of the United States.

171. Prior to October 15, 1940, said Jerry Gray duly assigned to said plaintiff, a music publisher, all of his rights, title and interest in and to said arrangement and version of said musical composition and the right to secure copyright therefor in its name.

172. On October 15, 1940, said plaintiff duly complied in all respects with the said Act of March 4, 1909 et cetera and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said arrangement and version of said musical composition as an unpublished new work and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "Oct. 15, 1940, Class E, unp. No. 236095".

173. Between March 16, 1941 and March 20, 1941, said plaintiff duly complied in all respects with the said Act of March 4, 1909 et cetera and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said arrangement and version of said musical composition as a published new work, and received from the Register of Copyrights a certificate of

registration, dated and identified as follows: "Mar. 19, 1941, Class E, pub. No. 93385".

174. Since March 17, 1941, said copyrighted arrangement and version of said musical composition has been published by said plaintiff and all copies of it made by it or under its authority or license have been printed, published and offered for sale in strict conformity with the provisions of the said Act of March 4, 1909 et cetera and all other laws governing copyrights.

175. Since March 17, 1941, said plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the said copyrights.

176. Said plaintiff itself not having theretofore used said copyrighted arrangement and version of said musical composition for the manufacture of parts of instruments serving to reproduce the same mechanically but having licensed others to do so did thereupon duly file notice thereof, accompanied by a recording fee, in the copyright office of the United States, in strict conformity with the provisions of the said Act of March 4, 1909 et cetera, and all other laws governing copyright.

177. After March 17, 1941 defendant Joseph Krug manufactured, distributed, vended, placed upon the market and sold, or caused others to manufacture, distribute, vend, place upon the market and sell parts of instruments, serving to reproduce mechanically said copyrighted musical composition and version thereof, made from a recording of a radio broadcast of a performance thereof by an orchestra conducted by Glen Miller, the labels of which bear the name of Glenn Miller and the legend "An A.F.N. Presentation" and the jackets of which bear both the name and likeness of Glenn Miller and likewise the legend "An A.F.N. Presentation".

178. After March 17, 1941, the other defendants distributed, vended, placed upon the market or sold such parts of instruments serving to reproduce mechanically said copyrighted musical composition and version thereof.

179. Defendant Joseph Krug has never served notice upon said plaintiff, by registered mail or otherwise, of their intention to use said copyrighted arrangement and version of said musical composition upon the parts of instruments serving to reproduce the same mechanically, under the compulsory license provision of the said Act of March 4, 1909 et cetera.

180. Defendant Joseph Krug thereby infringed said copyrights, in that such acts on his part were without any authorization, permission, consent or license.

181. The other defendants thereby infringed said copyrights in that such acts on their part were without any authorization, permission, consent or license.

182. A copy of said plaintiff's copyrighted arrangement and version of said musical composition is hereto annexed as "Exhibit 8"; and while no copies of defendants', infringement are attached because of their fragile nature, copies thereof will be proffered to the Court upon the trial of this action.

183. Defendants have been notified that defendants have infringed the said copyrights, and defendants have continued to infringe the copyrights.

184. Since some time subsequent to March 17, 1941, defendants have been continuously manufacturing, distributing, vending, or selling or otherwise marketing, under the said title "Xxvii Chorus", parts of instruments

serving to reproduce mechanically said arrangement and version of said musical composition of said plaintiff, and have thereby been engaging in unfair trade practices and unfair competition against said plaintiff to said plaintiff's irreparable damage.

FOR A FOURTH CAUSE OF ACTION:

185. Repeats and realleges each and every allegation contained in paragraph marked and numbered "28" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

186. Plaintiff, Mutual Music Society, Inc., is a corporation incorporated under the laws of the State of New York.

187. Repeats and realleges each and every allegation contained in paragraph marked and numbered "30" of the cause of action of plaintiff Shapiro, Bernstein & Co., Inc.

188. Prior to August 8, 1941, Jerry Gray, who then was and ever since has been a citizen of the United States, created and wrote an original musical composition entitled "STRING OF PEARLS".

189. This musical composition contains a large amount of material wholly original with said Jerry Gray and is copyrightable subject matter under the laws of the United States.

190. Prior to August 8, 1941, said Jerry Gray duly assigned to said plaintiff, a music publisher, said musical composition and the right to secure copyright therefor in its name.

191. On August 8, 1941, said plaintiff duly complied in all respects with the said Act of March 4, 1909 et cetera and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said musical composition as an unpublished work and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "Aug. 8, 1941, Class E, unp. No. 266444".

192. Prior to January 2, 1942, said Jerry Gray, with the consent and for and on behalf of said plaintiff as the proprietor of the copyright in said musical composition, produced, created and wrote a new and original arrangement and version of said musical composition entitled "A STRING OF PEARLS".

193. This arrangement and version of said musical composition contains a large amount of material wholly original with said Eddie DeLange and is copyrightable subject matter as a new work under the laws of the United States.

194. Prior to January 2, 1942, said Jerry Gray duly assigned to said plaintiff all of his rights, title and interest in and to said arrangement and version of said musical composition and the right to secure copyright thereof in its name.

195. Between January 1, 1942 and January 4, 1942, said plaintiff duly complied in all respects with the said Act of March 4, 1909 et cetera and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said arrangement and version of said musical composition as a published new work, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "Jan. 3, 1942, Class E, pub. No. 100559".

196. Since January 2, 1942, said arrangement and version of said musical composition has been published by said plaintiff and all copies of it made by it or under its authority or license have been printed, published and offered for sale in strict conformity with the provisions of the said Act of March 4, 1909 et cetera and all other laws governing copyright.

197. Since January 2, 1942, said plaintiff has been and still is the sole proprietor of all rights, title and interest in and to the said copyrights.

198. Said plaintiff itself not having theretofore used said copyrighted musical composition or arrangement and version thereof for the manufacture of parts of instruments serving to reproduce the same mechanically but having licensed others to do so did thereupon duly file notice thereof, accompanied by a recording fee, in the copyright office of the United States, in strict conformity with the provisions of the said Act of March 4, 1909 et cetera, and all other laws governing copyright.

199. After January 2, 1942 defendant Joseph Krug manufactured, distributed, vended, placed upon the market and sold, or caused others to manufacture, distribute, vend, place upon the market and sell parts of instruments, serving to reproduce mechanically said copyrighted musical composition and version thereof, made from a recording of a radio broadcast of a performance thereof by an orchestra conducted by Glenn Miller, the labels of which bear the name of Glenn Miller and the legend "An A. F. N. Presentation" and the jackets of which bear both the name and likeness of Glenn Miller and likewise the legend "An A. F. N. Presentation".

200. After January 2, 1942, the other defendants distributed, vended, placed upon the market or sold such

parts of instruments serving to reproduce mechanically said copyrighted musical composition and version thereof.

201. Defendant Joseph Krug has never served notice upon said plaintiff, by registered mail or otherwise, of his intention to use said copyrighted musical composition or arrangement and version thereof upon the parts of instruments serving to reproduce the same mechanically; under the compulsory license provision of the said Act of March 4, 1909 et cetera.

202. Defendant Joseph Krug thereby infringed said copyrights, in that such acts on his part were without any authorization, permission, consent or license.

203. The other defendants thereby infringed said copyrights in that such acts on their part were without any authorization, permission, consent or license.

204. A copy of said plaintiff's copyrighted arrangement and version of said musical composition is hereto annexed as "Exhibit 9"; said plaintiff's original copyrighted musical composition being the same as said version in pianoforte form; and while no copies of defendants' infringement are attached because of their fragile nature, copies thereof will be proffered to the Court upon the trial of this action.

205. Defendants have been notified that defendants have infringed the said copyrights, and defendants have continued to infringe the copyrights.

206. Since some time subsequent to January 2, 1942, defendants have been continuously manufacturing, distributing, vending, or selling or otherwise marketing, under the said title "String of Pearls" parts of instru-

ments serving to reproduce mechanically said musical composition and arrangement and version of said plaintiff, and have thereby been engaging in unfair trade practices and unfair competition against said plaintiff to said plaintiff's irreparable damage.

WHEREFORE, said plaintiff Helen D. Miller demands in respect to her said cause of action:

(1) That defendants, and each of them, and their respective agents and servants and all persons acting in privity or concert with them be enjoined during the pendency of this action and permanently from manufacturing, advertising, distributing, vending, selling, marketing or otherwise offering for sale or disposing of the A. F. N. records, or any other parts of instruments serving to reproduce mechanically the performances of Glenn Miller from recordings made without the authorization and consent of Glenn Miller or said plaintiff, and from using the name or likeness of Glenn Miller in connection therewith.

(2) That each of defendants be required to pay said plaintiff such damages, including exemplary damages, as said plaintiff has sustained in consequence of said unfair trade practices and unfair competition, and to account for all gains, profits and advantages derived by defendants by said trade practices and unfair competition.

(3) That defendants, and each of them, be required to deliver up for destruction.

(a) all recordings of the performances of Glenn Miller embodied in the A. F. N. records,

(b) all other recordings of performances of Glenn Miller made without the authorization and consent of Glenn Miller or said plaintiff,

(c) all matrices, plates, molds, stamps, discs, tapes and other matter for manufacturing phonograph records of the performances of Glenn Miller,

(d) all A. F. N. records and all other records of the performances of Glenn Miller manufactured without the authorization and consent of Glenn Miller or said plaintiff, and

(e) all labels, jackets, covers and advertising and publicity material bearing the name or likeness of Glenn Miller or concerning the recording or mechanical reproduction of the recording of any performance of Glenn Miller, not authorized and consented to by Glenn Miller or said plaintiff.

(4) That each of defendants pay to said plaintiff her costs of this action.

(5) That said plaintiff have such other and further relief as to the Court may seem just and proper.

WHEREFORE, said plaintiffs, Shapiro, Bernstein & Co., Inc., Gershwin Publishing Corporation, Edward B. Marks Music Corporation, Miller Music Corporation, Lewis Music Publishing Company, Inc. and Mutual Music Society, Inc. each demands, in respect to each of its said causes of action:

(1) That defendants, and each of them, and their respective agents, and servants be enjoined during the pendency of this action and permanently from infringing said copyrights of said plaintiff in any manner, and from manufacturing, distributing, vending, selling, marketing or otherwise disposing of any parts of instruments serving to reproduce mechanically said copyrighted musical composition, arrangement or version of said plaintiff.

(2) That each of defendants be required to pay to said plaintiff such damages as said plaintiff has sustained in consequence of defendants' infringement of said copyrights and said unfair trade practices and unfair competition and to account for

(a) all gains, profits and advantages, derived by defendants by said trade practices and unfair competition and

(b) all gains, profits, and advantages, derived by defendants by their infringement of said copyrights or such damages as to the Court shall appear proper within the provisions of the copyright statutes, including the royalty and in addition the further sum of three times the amount provided by section 1, subdivision (e), of the Act of March 4, 1909 et cetera, but not less than two hundred and fifty dollars for each such infringement by each of defendants of each of said copyrights.

(3) That defendants, and each of them, be required to deliver up to be impounded during the pendency of this action all parts serving to reproduce mechanically said copyrighted musical composition, arrangement or version in their possession or under their control and to deliver up for destruction all infringing parts and all matrices, plates, molds, stamps, discs, tapes and other matter for making such infringing parts.

(4) That each of defendants pay to said plaintiff its costs of this action and reasonable attorneys' fees to be allowed to said plaintiff by the Court.

(5) That said plaintiff have such other and further relief as is just.

Answer of Defendant Sam Goody.

(Record pages 146 to 162)

Defendant, Sam Goody, by his attorneys, Telsey, Lowenthal, Rothenberg & Mason:

ANSWERING THE COMPLAINT OF THE PLAINTIFF, HELEN D. MILLER, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALTON G. MILLER, DECEASED:

1: Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 1, 4 to 13, both inclusive, 15 and 17 of the complaint.

2: Admits the allegations in paragraph 2 of the complaint insofar as they refer or relate to him and alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations in said paragraph.

3: Denies each and every allegation in paragraph 3 of the complaint.

4: Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 14, 16, 18, 19 and 21 of the complaint, except that he alleges that in or about the year 1952 the defendant Joseph Krug represented to him that he, the said Joseph Krug, was duly authorized to manufacture and sell and did manufacture or cause to be manufactured phonograph records containing transcriptions of performances of musical compositions by an orchestra conducted by a musician known as Glenn Miller and offered to sell the same to this answering defendant for resale to consumers; this answering defendant believed the said representations to be true and accepted the said offer and

purchased approximately one hundred and fifty (150) such phonograph records from said Joseph Krug and resold them in the regular course of his business to consumers; this answering defendant does not have present clear recollection of the legends and inscriptions on the labels and jackets of the said phonograph records but believes that the legends and inscriptions on the said labels and jackets were substantially as alleged in the paragraphs of the complaint hereinabove mentioned.

5: Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20 of the complaint, except that he alleges that the labels on the said phonograph records purchased and sold by him as aforesaid and the jackets in which said phonograph records were encased contained statements or representations made by the manufacturer thereof that the performances transcribed on the said phonograph records were performances of the compositions listed in said paragraph of the complaint.

6: Denies the allegations in paragraph 22 of the complaint, except that he alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22 of the complaint insofar as the said allegations relate to the defendants other than this answering defendant, and except that with respect to the allegations in said paragraph as they relate or refer to this answering defendant, he admits that on or about February 15, 1952 he received a writing bearing that date, copy of which is annexed hereto and marked Exhibit "A" and that after the receipt of such writing, he did not purchase any additional copies of the said phonograph records but continued to sell such of said phonograph records originally purchased as aforesaid as remained in his possession until the same were completely disposed of.

Answer of Defendant Sam Goody.

7: Denies the allegations in paragraphs 23 to 27, both inclusive, of the complaint insofar as they relate or refer to him and alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in said paragraph insofar as they relate to the other defendants.

FOR A FIRST DEFENSE:

8: The complaint fails to state a claim against this answering defendant upon which relief can be granted.

FOR A SECOND DEFENSE:

9: Upon information and belief the phonograph records purchased and sold by this answering defendant, as aforesaid, contained transcriptions of performances of an orchestra, the members of which were at the time of the said performance in the armed forces of the United States, conducted by the said Glenn Miller, who was at that time in the armed forces of the United States.

10: Upon information and belief the said performances were rendered or given as part of and in the performance of the duties of the said members of the orchestra and the said Glenn Miller as members of the armed forces of the United States and were acts of the Government of the United States and not personal acts of the said performers.

11: The property rights in said performances, if any there be, are not and were not lodged in said Glenn Miller, nor in this plaintiff nor in any private persons and any such lodgment of any such property rights would be unlawful and against public policy.

Answer of Defendant Sam Goody.

FOR A THIRD DEFENSE:

12: This answering defendant is a retailer of phonograph records manufactured by others and purchases said records so manufactured by others in the regular course of his business as such retailer and resells the same to consumers.

13: In the purchase and resale of the phonograph records here involved, he acted reasonably and in good faith and without knowledge of plaintiff's claim of right, as alleged in the complaint, and without intent to do harm or injury to the plaintiff or to any other person or the property rights of any of them.

FOR A FOURTH DEFENSE:

14: Plaintiff delayed the commencement of this action for an unreasonable length of time after she ascertained or should have ascertained the facts alleged in the complaint, to this answering defendant's prejudice.

15: By virtue of the foregoing, plaintiff has been guilty of such laches as should in equity bar the plaintiff from maintaining this action.

ANSWERING THE COMPLAINT OF PLAINTIFF, SHAPIRO, BERNSTEIN & CO., INC.:

16: Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 28, 29 and 31 to 42, both inclusive of the complaint.

17: Admits the allegations in paragraph 30 of the complaint insofar as they refer to or relate to him and alleges

that he is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations in said paragraph.

18: Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 43 to 47, both inclusive, and 50 of the complaint, except that he alleges that in or about the year 1952 the defendant Joseph Krug represented to him that he, the said Joseph Krug, was duly authorized to manufacture and sell and did manufacture or cause to be manufactured phonograph records containing transcriptions of performances of the musical composition described in said plaintiff's complaint and offered to sell the same to this answering defendant for resale to consumers; that he believed the said representations to be true and that he accepted the said offer and purchased approximately one hundred and fifty (150) of such phonograph records from said Joseph Krug and resold them in the regular course of his business to consumers; this answering defendant does not have present clear recollection of the legends and inscriptions on the labels and jackets of said phonograph records but believes that the legends and inscriptions on the said labels and jackets were substantially as alleged in the paragraphs of the complaint hereinabove mentioned.

19: Admits that certain papers and writings are annexed to the complaint as Exhibit 1 and alleges that he is without knowledge or information sufficient to form a belief as to the truth of all of the other allegations in paragraph 48 of the complaint.

20: Denies the allegations in paragraph 49 of the complaint insofar as they refer or relate to him and alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations of said paragraph.

Answer of Defendant Sam Goody.

ANSWERING THE COMPLAINT OF PLAINTIFF GERSHWIN PUBLISHING CORPORATION:

21: Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 28 (as re-alleged in paragraph 51), 52 and 54 to 61, both inclusive, of the complaint.

22: Admits the allegations in paragraph 30 (as re-alleged in paragraph 53) of the complaint insofar as they refer or relate to him and alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations in said paragraph.

23: Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 62 to 66 both inclusive, and 69 of the complaint, except that he alleges that in or about the year 1952 the defendant Joseph Krug represented to him that he, the said Joseph Krug, was duly authorized to manufacture and sell and did manufacture or cause to be manufactured phonograph records containing transcriptions of performances of the musical composition described in said plaintiff's complaint and offered to sell the same to this answering defendant for resale to consumer; that he believed the said rerepresentations to be true and that he accepted the said offer and purchased approximately one hundred and fifty (150) of said phonograph records from said Joseph Krug and resold them in the regular course of his business to consumers; that he does not have present clear recollection of the legends and inscriptions on the labels and jackets of said phonograph records but believes that the legends and inscriptions on the said labels and jackets were substantially as alleged in the paragraphs of the complaint hereinabove mentioned.

24: Admits that certain papers and writings are annexed to the complaint as Exhibit 2 and alleges that he is without knowledge or information sufficient to form a belief as to the truth of all of the other allegations in paragraph 67 of the complaint.

25: Denies the allegations in paragraph 68 of the complaint insofar as they refer or relate to him and alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations in said paragraph.

ANSWERING THE COMPLAINT OF PLAINTIFF EDWARD B. MARKS MUSIC CORPORATION:

26: Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 28 (as re-alleged in paragraph 70), 71 and 73 to 79, both inclusive, of the complaint.

27: Admits the allegations in paragraph 30 (as re-alleged in paragraph 72) of the complaint insofar as they refer or relate to him and alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations in said paragraph.

28: Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 80 to 84, both inclusive, and 87 of the complaint, except that he alleges that in or about the year 1952 the defendant Joseph Krug represented to him that he, the said Joseph Krug, was duly authorized to manufacture and sell and did manufacture or cause to be manufactured phonograph records containing transcriptions of performances of the musical composition described

in said plaintiff's complaint and offered to sell the same to this answering defendant for resale to consumers; that he believed the said representations to be true and that he accepted the said offer and purchased approximately one hundred and fifty (150) of said phonograph records from said Joseph Krug and resold them in the regular course of his business to consumers: that he does not have present clear recollection of the legends and inscriptions on the labels and jackets of said phonograph records but believes that the legends and inscriptions on the said labels and jackets were substantially as alleged in the paragraphs of the complaint hereinabove mentioned.

29: Admits that certain papers and writings are annexed to the complaint as Exhibit 3 and alleges that he is without knowledge or information sufficient to form a belief as to the truth of all of the other allegations in paragraph 85 of the complaint.

30: Denies the allegations in paragraph 86 of the complaint insofar as they refer or relate to him and alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations in said paragraph.

ANSWERING THE COMPLAINT OF PLAINTIFF MILLER MUSIC CORPORATION:

31: Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 28 (as re-alleged in paragraph 88), 89 and 91 to 98, both inclusive, of the complaint.

32. Admits the allegations in paragraph 30 (as re-alleged in paragraph 90) of the complaint insofar as they

refer or relate to him and alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations in said paragraph.

33. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 99 to 103, both inclusive, and 106 of the complaint, except that he alleges that in or about the year 1952 the defendant Joseph Krug represented to him that he, the said Joseph Krug, was duly authorized to manufacture and sell and did manufacture or cause to be manufactured phonograph records containing transcriptions of performances of the musical composition described in said plaintiff's complaint and offered to sell the same to this answering defendant for resale to consumers; that he believed the said representations to be true and that he accepted the said offer and purchased approximately one hundred and fifty (150) of said phonograph records from said Joseph Krug and resold them in the regular course of his business to consumers; that he does not have present clear recollection of the legends and inscriptions on the labels and jackets of said phonograph records but believes that the legends and inscriptions on the said labels and jackets were substantially as alleged in the paragraphs of the complaint hereinabove mentioned.

34. Admits that certain papers and writings are annexed to the complaint as Exhibit 4 and alleges that he is without knowledge or information sufficient to form a belief as to the truth of all of the other allegations in paragraph 104 of the complaint.

35. Denies the allegations in paragraph 105 of the complaint insofar as they refer or relate to him and alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations in said paragraph.

Answer of Defendant Sam Goody.

ANSWERING THE COMPLAINT OF PLAINTIFF LEWIS MUSIC PUBLISHING COMPANY, INC.

36. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 28 (as re-alleged in paragraph 107), 108 and 110 to 120, both inclusive, of the complaint.

37. Admits the allegations in paragraph 30 (as re-alleged in paragraph 109) of the complaint insofar as they refer or relate to him and alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations in said paragraph.

38. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 121 to 125, both inclusive, and 128 of the complaint, except that he alleges that in or about the year 1952 the defendant, Joseph Krug, represented to him that he, the said Joseph Krug, was duly authorized to manufacture and sell and did manufacture or cause to be manufactured phonograph records containing transcriptions of performances of the musical composition described in said plaintiff's complaint and offered to sell the same to this answering defendant for resale to consumers; that he believed the said representations to be true and that he accepted the said offer and purchased approximately one hundred and fifty (150) of said phonograph records from said Joseph Krug and resold them in the regular course of his business to consumers; that he does not have present clear recollection of the legends and inscriptions on the labels and jackets of said phonograph records but believes that the legends and inscriptions on the said labels and jackets were substantially as alleged in the paragraphs of the complaint hereinabove mentioned.

39. Admits that certain papers and writings are annexed to the complaint as Exhibit 5 and alleges that he

is without knowledge or information sufficient to form a belief as to the truth of all of the other allegations in paragraph 126 of the complaint.

40. Denies the allegations in paragraph 127 of the complaint insofar as they refer or relate to him and alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations of said paragraph.

ANSWERING THE COMPLAINT OF PLAINTIFF MUTUAL MUSIC SOCIETY, INC.:

41. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 28 (as re-alleged in paragraphs 129, 147, 166 and 185), 130, 132 to 138, both inclusive, 148, 150, to 157, both inclusive, 167, 169 to 176, both inclusive, 186, and 188 to 198, both inclusive, of the complaint.

42. Admits the allegations in paragraph 30 (as re-alleged in paragraphs 131, 149, 168 and 187) of the complaint insofar as they refer or relate to him and alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations in said paragraphs.

43. Alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 139 to 143, both inclusive, 146, 158 to 162, both inclusive, 165, 177 to 181, both inclusive, 184, 199 to 203, both inclusive, and 206 of the complaint, except that he alleges that in or about the year 1952 Joseph Krug represented to him that he, the said Joseph Krug, was duly authorized to manufacture and sell and did manufacture or cause to be manufactured phonograph records containing transcriptions of performances of the musical

compositions described in said plaintiff's complaint and offered to sell the same to this answering defendant for resale to consumers; that he believed the said representations to be true and that he accepted the said offer and purchased approximately one hundred and fifty (150) of said phonograph records from said Joseph Krug and resold them in the regular course of his business to consumers; that he does not have present clear recollection of the legends and inscriptions on the labels and jackets of said phonograph records but believes that the legends and inscriptions on the said labels and jackets were substantially as alleged in the paragraphs of the complaint hereinabove mentioned.

44. Admits that certain papers and writings are annexed to the complaint as Exhibits 6, 7, 8 and 9 and alleges that he is without knowledge or information sufficient to form a belief as to the truth of all of the other allegations in paragraphs 144, 163, 182 and 204 of the complaint.

45: Denies the allegations in paragraphs 145, 164, 183 and 205 of the complaint insofar as they refer or relate to him and alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the other allegations of said paragraphs.

FOR A FIRST DEFENSE TO THE COMPLAINTS OF THE DEFENDANTS SHAPIRO, BERNSTEIN & CO., INC.; GERSHWIN PUBLISHING CORPORATION; EDWARD B. MARKS MUSIC CORPORATION; MILLER MUSIC CORPORATION; LEWIS MUSIC PUBLISHING COMPANY, INC.; and MUTUAL MUSIC SOCIETY, INC., AND, EACH AND EVERY CAUSE OF ACTION ALLEGED THEREIN:

46: This answering defendant is a retailer of phonograph records manufactured by others and purchases such records so manufactured by others in the regular course

of his business as such retailer and resells the same to consumers.

47: In the purchase and resale of the phonograph records here involved, he acted reasonably and in good faith and without knowledge of any of the claims of any of the said plaintiffs as alleged in their respective complaints, and without intent to do harm or injury to the said plaintiffs, or any of them, or to any other person or the property rights of any of them.

48: This answering defendant had no information and no reasonable grounds for belief that the defendant Krug was not in all respects authorized to issue the phonograph records purchased from him by this answering defendant and that said defendant Krug had not complied with the provisions of the copyright laws in such cases made and provided.

FOR A CROSS CLAIM AGAINST THE DEFENDANT JOSEPH KRUG:

49: Upon information and belief, at all pertinent times, the said defendant, Joseph Krug, was doing business under the firm name and style of A. F. N. Records Co. and was engaged in the business of manufacturing and selling phonograph records under the designation "A. F. N. Records".

50: The said defendant, Joseph Krug, represented that he had manufactured or caused to be manufactured and was offering to sell two phonograph records containing or embodying transcriptions of performances of the musical compositions named in the complaint herein by an orchestra conducted by Glenn Miller; that he had been duly authorized to manufacture said phonograph records or to cause them to be manufactured and to sell them; that he had duly complied with all the provisions of the copy-

right laws of the United States thereunto appertaining; and that by virtue of such compliance the said phonograph records had been freed from further contribution to any copyrights therein involved.

51: The said representations were so made by the defendant Krug in order to induce this answering defendant to purchase copies of said phonograph records.

52: This answering defendant believed the said representations to be true and, except for the allegations in the complaint, had, and still has, no knowledge that the same were in any respects false or untrue. This answering defendant relied upon the said representations and purchased one hundred and fifty of each of said phonograph records from the defendant Krug in reliance thereon.

53: If the allegations in the complaint herein are true and found to be true, then said representations were made by the defendant Krug either with knowledge that the same were untrue or recklessly and without regard to the actual truth thereof, for the purpose of inducing this answering defendant to purchase said phonograph records as aforesaid, and at the time of making said representations said defendant Krug either knew the same were untrue or did not in fact have any knowledge as to the truth thereof to support the making thereof.

54: If the plaintiffs, or any of them, recover against this answering defendant for damages alleged to have been sustained, as set forth in the complaint, said representations by said defendant Krug to this answering defendant will necessarily have been untrue in fact, and will not have been innocent, but made with knowledge of their untruth or made without regard to their truth, and such damages so recovered, and damage to this answering de-

fendant in the amount thereof, will have been brought about as a result of the representations by said defendant Krug as aforesaid, the falsity of said representations, together with this defendant's reliance upon said representations and not by any wrongful act of this defendant.

WHEREFORE, the defendant, Sam Goody, demands judgment dismissing the complaint, and each and every cause of action therein alleged, as to him, with costs, and further demands that the ultimate rights of this defendant and of the defendant Joseph Krug, co-defendant in this action, as between themselves, be determined in this action, and by the judgment herein, and that this defendant have judgment over and against the co-defendant, Joseph Krug, for any sum or sums which may be recovered herein by the plaintiffs, or any of them, against this defendant, together with the costs and disbursements of this action.

Answer of Defendant Portem Distributing, Inc.

(Record pp 163 to 164)

The defendant, Portem Distributing, Inc., by Raucher & Leftoff, its attorneys, answering the complaint of the plaintiffs herein, alleges as follows:

FIRST: Denies each and every allegation contained in Paragraphs marked 3 and 27 of said complaint.

SECOND: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in Paragraphs of the complaint marked 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 23, 24, 25, 26, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84,

85, 87, 89, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106, 108, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 128, 130, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 146, 148, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 165, 167, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 184, 186, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 206.

THIRD: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in Paragraphs of the complaint marked 2, 30, 53, 72, 90, 109, 131, 149, 168, 187, except that Portem Distributing, Inc. is a domestic corporation.

FOURTH: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in Paragraphs of the complaint marked 18 and 19 except that Portem Distributing, Inc. has purchased from A. F. N. Record Co. five hundred fifty (550) records for the sum of Six Hundred Thirty ($630.00) Dollars, which purchases were made on February 14, 1952, June 6, 1952 and July 26, 1952.

FIFTH: Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in Paragraphs of the complaint marked 22, 49, 68, 86, 105, 127, 145, 164, 183, 205, except that it had received notice in February 1952 after having purchased four hundred (400) records for the sum of Four Hundred Fighty ($480.00) Dollars from the defendant A. F. N. Record Co.

WHEREFORE, the defendant, Portem Distributing, Inc., demands judgment dismissing the complaint herein.

Dated: New York, N. Y., June 24, 1954.

Motion of Plaintiff Shapiro, Bernstein & Co., Inc. for Summary Judgment.

(Record pp. 384 to 385)

Plaintiff, Shapiro, Bernstein & Co., Inc. moves the Court in the above-entitled cause as follows:

That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in favor of said plaintiff and against each of defendants Sam Goody and Portem Distributing, Inc., adjudging that said plaintiff recover of each of said defendants the sum of $250.00, as the minimum amount recoverable under the Copyright Act for the infringement by each of said defendants of the copyright in the musical composition of said plaintiff entitled "In the Mood", in addition to full costs against each of said defendants including a reasonable attorney's fee to be allowed by the court to said plaintiff against each of said defendants, and for injunctive relief and the direction to forthwith deliver up on oath for destruction all infringing parts of instruments serving to reproduce mechanically said musical composition, being the relief demanded in the cause of action of said plaintiff set forth in the complaint herein; on the ground that there is no genuine issue as to any material fact and that said plaintiff is entitled to said judgment as a matter of law as against each of said defendants, as more fully appears from the affidavits of Harry Fox, David Mackay and Julian T. Abeles, attached hereto as "Exhibit A", "Exhibit B" and "Exhibit C" respectively.

Dated, New York, N. Y., January 23, 1956.

Affidavit of Harry Fox, in Support of Motion of Plaintiff Shapiro, Bernstein & Co., Inc.

(Record pp. 386 to 399)

HARRY FOX, being duly sworn, says:

1. This affidavit is submitted in support of the application of plaintiff Shapiro, Bernstein & Co., Inc. (a music publisher) for summary judgment against defendants Sam Goody (who conducts a "cut-rate" retail store for the sale of phonograph records and other musical items) and Portem Distributing, Inc. (a distributor of phonograph records to certain retail dealers). The application is made in conjunction with like applications by the other five plaintiff music publishers. Each of the moving plaintiffs is one of the leading music publishers in the United States and each of the musical compositions, the subject matter of this action, is one of the principal compositions in the respective catalogues of said plaintiffs. All of the matters set forth in this affidavit are of my own personal knowledge.

2. The action was brought by each of said plaintiffs to recover royalties and damages and for other relief available under the Copyright Act, for the unauthorized and illegal manufacture, distribution and sale of parts of instruments serving to reproduce mechanically (phonograph records) of the said copyrighted musical compositions of said plaintiffs. While Helen D. Miller, Individually and as Executrix of Estate of Alton G. Miller (Glenn Miller) Deceased, joined as a party plaintiff, she is not one of the moving parties.

3. This action was instituted on behalf of said music publisher plaintiffs at my instance, as the exclusive agent and trustee for over three hundred of the leading music

publishers in the United States, in the licensing to legitimate recording companies of the right to manufacture phonograph records reproducing the copyrighted musical compositions of my said principals, and in the prosecution of suits throughout the United States against unscrupulous manufacturers, distributors and dealers for the unauthorized and illegal manufacture, distribution and sale of phonograph records reproducing the copyrighted musical compositions of my said principals, among other things by a process known in the trade as "bottlegging".

4. Such "bootlegging" is perpetrated by one of two methods. The one method is to make a master recording from the record of a leigtimate manufacturer, and then make copies from the master recording which are sold to the public as the records of the legitimate manufacturer. The other method, employed in the instant case, is to make an off-the-air recording of the performance of a famous artist or orchestra on radio or television, and to then manufacture and sell such records in competition to and as a substitute for phonograph records of a legitimate manufacturer reproducing the authorized recording of the performance by the same artist or orchestra of the same composition. In either such case the costs and charges of the artist, the musicians, the recording personnel, the union, and of overhead, advertising, et cetera, in addition to the required royalty payments to the music publisher, are thereby eliminated. The said records are thus manufactured, and sold to unscrupulous distributors and dealers, at a substantially lower price than the legitimate records and are in turn palmed off to the public by such record dealers, who specialize in so-called "cut-rate" operations, at a reduced price as aforesaid in competition to and as a substitute for the legitimate records.

5. There are two infringing records reproducing the copyrighted musical compositions of the music publisher plaintiffs in the instant case, designated respectively "Volume 1" and "Volume 2". These are what are known as long playing records, six compositions being recorded on "Volume 1" and seven compositions being recorded on "Volume 2". The copyrighted musical composition of this moving plaintiff, entitled "In the Mood", is reproduced on the record designation as "Volume 1". The two infringing records, with the respective jackets in which they are contained, are marked respectively "Exhibit A(1)" and "Exhibit A(2)" and made a part hereof. (While, because of their bulky and fragile nature they cannot be attached, they will be proffered to the Court upon the argument, and while said defendants are well aware of the nature thereof they will at all times prior to the argument be made available for examination by said defendants and their counsel at the office of the attorneys for said plaintiffs herein.)

6. It is the invariable practice of every legitimate record manufacturer to print on the record label both the trade name of the manufacturer and the trade mark by which the product of the manufacturer is known to the trade, and to likewise print on the record label or the jacket both the full name and address of the manufacturer. However, on the labels and jackets of the two infringing records, there is merely printed "An A.F.N. Presentation" (coined only for those two records), and neither the name nor address of the manufacturer appears on either the record label or the jacket. This is in accord with the uniform practice of all manufacturers of such infringing records, to use a different coined purported trade name or make for each set of records, and to omit both the name and address of the manufacturer. The use of such an unknown specialty

coined purported trade name or mark, and the deliberate omission of both the name and address of the manufacturer, is obviously an infallible earmark of an infringing record. As it puts all distributors and dealers on immediate notice that it is an infringing record, such records are only disseminated and sold, as aforesaid, by the distributors and dealers who traffic in this type of record.

7. The purpose of concealing the identity of the manufacturer is of course to make it extremely difficult, if not impossible, for the legitimate manufacturer whose records are being duped, as well as the music publisher whose compositions are being illegally recorded, to trace the source. When other records of this nature first appeared on the market, in such instances where I could ascertain the source, I had my attorneys institute suit against the manufacturer. This was invariably an irresponsible individual, who repeatedly changed his base of operations and continued to manufacture and flood the market with other such records, under variable specially coined purported trade names and marks. Furthermore, in every instance the judgment obtained against the manufacturer even with injunctive relief was utterly worthless, as the distributors and dealers, who regularly trafficked in such infringing records, continued to market the same product under such other specifically coined purported trade names and marks. Accordingly, in recent actions I have had such distributors and dealers joined as party defendants with the manufacturer, as in the instant case. Even the minimum recovery of $250.00 against each such infringer for the infringement of each said composition, together with counsel fees, represents only a minor part of the damages suffered and expense incurred by my principals. Unfortunately Section 101(e) of the Copyright Act provides that "no criminal action shall be brought" for the unauthorized

use of a copyrighted musical composition upon phonograph records. Accordingly, actions of this nature are the only recourse to curtain a condition which is rapidly mushrooming into a serious threat to the phonograph recording and music publishing industries.

8. The records in the instant case were made from off-the-air recordings of radio broadcast performances of Glenn Miller and orchestra, while he was a major in the United States Army during the last world war. On the label of each record there is printed the legend "Major Glenn Miller And The A.E.F. Orchestra." On the front of the jacket of each record there is a reproduction of a photograph of Major Glenn Miller in his uniform, above the legend "Major Glenn Miller and His A E F Orchestra", and on the back of the jacket of each record there is printed the following "Tribute" to encourage the purchase of the record by the general public:

"MAJOR GLENN MILLER
A Tribute

Here, Finally, is a presentation of music *by the greatest dance orchestra of all time.* Gathered from the four corners of the United States by the U. S. Army, this orchestra gained the admiration and respect of every Allied soldier that heard them as well as the entire musical world. Featuring fine instrumentalists and soloists like Ray McKinley, Mel Powell, and Peanuts Nucko, with arrangements by Jerry Gray, this orchestra undoubtedly will never be equaled. Despite the formation of at least a dozen so called "Miller-styled" orchestras, *the sounds and style have remained unique to the Miller-led orchestras. Not since the tragic death of Major Miller has any one*

man or orchestra captured the public as Glenn Miller did in 1939, and even today the Miller records, all popular standards, rank as the best sellers in the dance band field.

In these two volumes we are proud to present the last recordings made by a Miller-led orchestra. These recordings were taken from propaganda broadcasts made in London and beamed directly at the German soldiers. The numbers are introduced by Major Miller and an unidentified announcer calling herself "Ilsa." There is also the added kick of hearing Sgt. Johnny Desmond now one of our more popular male vocalists, singing in German.

We feel that it is fitting and proper to dedicate these two volumes to the memory of a great musician, soldier, and patriot, Major Glenn Miller."

9. Major Glenn Miller, who lost his life while in the service of his country during the last world war, was one of the outstanding orchestra leaders of all time. By reason of his great popularity, during his lifetime there was an unusual public demand for phonograph records of his performances, which has continued at all times since his death. During the period of the sale of the infringing records in the instant case, Universal Pictures Company, Inc. released a motion picture based upon the life of Major Glenn Miller, which was one of the outstanding and successful motion pictures of its day, and which further enhanced the sale of phonograph records of his past performances. Since 1938 the R C A Victor division of Radio Corporation of America (hereinafter referred to as "Victor") has had the exclusive right to manufacture and sell phonograph records of all performances of musical compositions by Glenn Miller, and to use his name and likeness in the advertising and sale thereof, which fact has at all such times been well

known in the trade. This included the exclusive right to manufacture and sell phonograph records of all radio broadcasts of performances of musical compositions by Glenn Miller, which had been recorded and preserved on acetate discs, and to likewise use his name and likeness in the advertising and sale of such records.

10. The said infringing records are of poor technical quality and far below the standards of the Victor records. This discouraged purchasers of the infringing records from making subsequent purchases of the legitimate Victor Records, and by word of mouth such purchasers likewise discouraged others from purchasing the Victor records. This has materially impaired the marketing of Victor records, and has thereby deprived the music publisher plaintiffs of substantial royalties they would otherwise have received from Victor from the marketing of their records. Said plaintiffs have further been damaged by the sale of the infringing records, in that the sale of records of other recordings of the same musical compositions by other recording artists and orchestras has thereby been greatly curtailed.

11. After an extensive investigation made at the instance of Victor by David Mackay, Esquire, the attorney for plaintiff, Helen D. Miller, the widow of Glenn Miller (whose affidavit is hereto attached), it was ascertained that such infringing records were being manufactured in New York City by defendant Joseph Krug, under the coined purported trade name of AFN Record Co. As in every case the name of said alleged company did not appear in the New York City telephone directory, and no certificate of doing business under said trade name had been filed in the County Clerk's office. Upon the matter being brought to the attention of the District Attorney,

he directed said defendant to file a certificate setting forth his said place of business. Said defendant then filed a certificate of doing business under said trade name, giving an address in Brooklyn which was a vacant store.

12. Said defendant failed to obey an order of this Court made herein, to deliver up to a Special Master appointed by this Court the original recordings and other matter for manufacturing such infringing records, and said defendant likewise failed to obey a subpoena of this Court issued herein to appear before the Special Master with his pertinent books and records and give his testimony. Thereupon under date of February 1, 1955, this Court made on order herein directing said defendant to show cause why he should not be punished for contempt of this Court, and directing the United States Marshal to arrest said defendant and hold him in bail, conditioned for his appearance at said hearing and further conditioned that said defendant hold himself amenable to all orders of this Court. Said defendant was thereupon taken into custody and lodged in jail. He subsequently appeared before the Special Master and give his testimony, the transcript of which is on file in the Clerk's office in this action with the Special Master's report. As appears from said testimony, which is hereby referred to and made a part hereof, such infringing records were manufactured from off-the-air tape recording made in England during the last war, from propaganda radio broadcasts of said compositions by Major Glenn Miller and orchestra; during the period of the manufacture and sale of such records said defendant had been employed as a salesman by a retail music store in the City and that he had been previously employed by an automobile repair shop in Brookyn; that he had no business cards, business stationery or bill heads; he had no place of business or employees and no telephone listing; the records

were manufactured for him by some outfit in East Newark, New Jersey and delivered to him at his employer's place of business, and in turn delivered by him in person to said defendants Portem Distributing, Inc. and Sam Goody; they both knew that he was not a record manufacturer; he never rendered a statement to either of said defendants; although he had a bank account at the time none of such receipts for said records were ever deposited; in most instances such payments were made in cash, and in such instances where they were made by check he endorsed the check and it was either cashed for him by the payor or by his said employers; when a receipt was requested for such cash payments he used a rubber stamp on a blank form of receipt; as in every such case, for the purpose of defrauding the public the records were listed at the same price as the legitimate Victor records and then offered for sale at approximately half the list price; that he never filed any tax return or made any tax payment, whether City, State or Federal; that such infringing records were being sold by said defendant Sam Goody to the public, in competition with the legitimate records of Glen Miller manufactured by Victor; and that the only record kept by him of the records manufactured and sold was a single sheet of paper upon which he had noted a number of such transactions, but that he could not recall to what extent it was incomplete.

It has been my experience, in endeavoring to enforce the rights of the music publishers against all those involved in this type of operation, that only a trivial part of the records actually manufactured and sold can ever be traced. It is strictly an "under the counter" transaction between the manufacturer, distributor and dealer. While the sudden substantial drop in the purchase and sale of the legitimate records by the dealers engaging in each

one of these illegal operations, evidences extremely large sales of the infringing records, only a few hundred of such records are ever accounted for. I had a recent experience where a record manufacturer engaged in "cut-price" operations had accounted for royalties of only approximately $5,000.00. My investigation revealed that the royalties actually owing were over $200,000.00 and I have now received an offer of settlement for $40,000.00.

13. Each of said defendants, Portem Distributing Inc. and Sam Goody, has unequivocally admitted in their respective answers herein the purchase and sale of such infringing records. In the answer of Portem Distributing, Inc. it is admitted that such records were both purchased and sold, after notice from plaintiff Helen D. Miller that the purchase and sale thereof was unauthorized and illegal. In the answer of Sam Goody it is admitted that such records were sold, after like notice from plaintiff Helen D. Miller.

(1) *Answer of Defendant Portem Distributing, Inc.*

It is admitted (par. Fourth) that said defendant "has purchased from A. F. N. Record Co. five hundred fifty (550) records for the sum of Six Hundred Fifty ($650.00) Dollars which purchases were made on February 14, 1952, June 6, 1952 and July 26, 1952." It is further admitted (par. Fifth) that "it had received notice in February 1952 after having purchased four hundred (400) records for the sum of Four Hundred Eighty ($480.00) Dollars from defendant A. F. N. Record Co." The defendant Joseph Krug testified before the Special Master that his incomplete records showed additional sales and deliveries made by him to this defendant, of 480 records on February 5, 1952, and 100 records on February 21, 1952.

Affidavit of Harry Fox, in Support of Motion of Plaintiff Shapiro, Bernstein & Co., Inc.

Said defendant denies knowledge of the authorship, copyright and proprietorship of said plaintiff's composition, and of the filing by said plaintiff in the Copyright Office, pursuant to Section 1(e) of the Copyright Act, of notice of having licensed the use of said composition under the parts of instruments serving to reproduce the same mechanically.

(2) *Answer of Defendant Sam Goody*

It is admitted (par. 18) that said defendant "purchased approximately one hundred and fifty (150) of such phonograph records from said Joseph Krug and resold them in the regular course of his business to consumers": It is further admitted (par. 6) "that after the receipt of such writing (referring to the said notice from plaintiff Helen D. Miller) he did not purchase any additional records but continued to sell such of said phonograph records originally purchased as aforesaid as remained in his possession until the same were completely disposed of." While said defendant alleged as aforesaid that he only purchased "approximately one hundred and fifty (150) of such phonograph records from said Joseph Krug", in the "Cross Claim" of said defendant against said defendant Joseph Krug (par. 52) he admits that he "purchased one hundred and fifty of each of said phonograph records from the defendant Krug". The defendant Joseph Krug testified before the Special Master from his incomplete records to the sale and delivery of 500 records to this defendant.

Said defendant denies knowledge of the authorship, copyright and proprietorship of said plaintiff's composition, and of the filing by said plaintiff in the Copyright Office, pursuant to Section 1(e) of the Copyright Act, of notice of having licensed the use of said composition upon the parts of instruments serving to reproduce the same mechanically.

Said defendant likewise interposed a separate defense to the respective causes of action of the music publisher plaintiffs (pars. 46-48), that such infringing records were purchased and sold by him "without intent to do harm or injury to said plaintiffs, or any of them, or to any other person or the property rights of any of them", which defense I am advised by counsel is wholly insufficient in law in a copyright infringement action.

14. For the purpose of establishing the allegations in the cause of action of this moving plaintiff, of which said defendants have denied knowledge, the following documents, pertaining to said plaintiff's copyrighted musical composition entitled "In the Mood", are hereto attached and made a part hereof:

(1) "Exhibit A(3)"—Photostat of certificate of the Register of Copyrights of the copyright by Lewis Music Publishing Company, Inc., pursuant to Section 12 of the Copyright Act of a work not reproduced for sale, by the deposit of one complete copy thereof on November 26, 1938 with claim of copyright, dated and identified as follows: "Entry: Class E., unp., No. 181388".

(2) "Exhibit A(4)"—Photostat of assignment of said copyright mentioned in (1) supra, dated October 9, 1939, from said Lewis Music Publishing Company, Inc. to said plaintiff Shapiro, Bernstein & Co. Inc., with annexed certificate of the Assistant Register of Copyrights, dated October 17, 1939, of the recording thereof on October 11, 1939, book 425, page 163.

(3) "Exhibit A(5)"—Photostat of certificate of the Register of Copyrights, of the deposit by said plaintiff Shapiro, Bernstein & Co. Inc. pursuant to Section 13

of the Copyright Act, of two complete copies of the best edition thereof, then published, accompanied by a claim to copyright, dated and identified as follows: "Date of publication Nov. 27, 1939. Copies received Jan. 23, 1940. Entry: Class E, pub., No. 82707".

(4) "Exhibit A(6)"—Certificate of the Assistant Register of Copyrights, dated April 26, 1954, with attached photostat of "Notice of Use On Mechanical Instruments", filed by said plaintiff Shapiro, Bernstein & Co. Inc. on November 14, 1939 accompanied by the required recording fee, pursuant to Section 1(e) of the Copyright Act.

15. Upon prior applications for summary judgment made on behalf of my music publisher principals, the request has been made for the appointment of a Special Master to compute and ascertain the amount of the royalties and damages for which judgment should be entered. However, because of the time and expense involved and the utter failure of the defendants to keep records of such transactions, from which anything like a true computation could be made, my principals have been obliged to resort to the $250.00 minimum recovery against each defendant for the infringement of each composition, under Section 101 of the Act, in addition to costs including attorneys' fees under Section 116 of the Act. While, as aforesaid, this represents only a nominal part of the damages actually sustained and the costs and expense incurred, unfortunately they have no other recourse.

(Sworn to by Harry Fox on January 23, 1956.)

Affidavit of David Mackay, in Support of Motion of Plaintiff Shapiro, Bernstein & Co., Inc.

(Record pages 405 to 409)

DAVID MACKAY, being duly sworn, says:

1. I am the attorney for plaintiff Helen D. Miller, Individually and as Executrix of the Estate of Alton G. Miller, Deceased.

2. Under date of February 6, 1952, I mailed a communication to defendant Portem Distributing, Inc., a distributor of phonograph records, to its place of business at 639 Tenth Avenue, New York, N. Y., a copy of which is attached hereto marked "Exhibit B(1)" and made a part hereof. On February 14, 1952, Morris B. Raucher, Esquire, a member of the firm of Raucher & Leftoff, Esquires, the attorneys who have appeared for said defendant in this action, telephoned me and advised me that he had instructed his client to discontinue the purchase and sale of the infringing records, the subject matter of this action, and that he would furnish me with the name and address of the party selling such records to said defendant. This information was never furnished to me. Furthermore, in the answer interposed by said defendant in this action, it is admitted that subsequent purchases of such records were made by said defendant "on February 14, 1952, June 6, 1952 and July 26, 1952."

3. Under date of February 15, 1952, I mailed a communication to defendant Sam Goody, who conducts a "cut-rate" retail store for the sale of phonograph records and other musical items, to his place of business at 235 West 49th Street, New York, N. Y., a copy of which is attached hereto marked "Exhibit B(2)" and made a part hereof. Having ascertained that as late as January 25, 1954 such

infringing records were still regularly being offered for sale by said defendant at his said place of business, under date of February 5, 1954 I mailed a second communication to said defendant to his said place of business, a copy of which is attached hereto marked "Exhibit B(3)" and made a part hereof. Thereafter, on February 18, 1954, I personally visited the said place of business of said defendant, where I found such infringing records to still be on sale.

(Sworn to by David Mackay on January 19, 1956.)

Exhibit B(1), Annexed to Foregoing Affidavit.

February 6, 1952

REGISTERED
Portem Distributing, Inc.
639 10th Avenue
New York, N. Y.

Dear Sirs:

It has come to my attention as attorney for Mrs. Helen D. Miller, who is the widow of the late Glenn Miller and Executrix of his estate, that you are currently distributing two long-playing phonograph records marked "AFN" and which embody performances of the Glenn Miller orchestra and use the Glenn Miller picture and name. These records have been made from recordings of broadcast performances of the Miller orchestra at the time Major Miller and the members of the orchestra were in the United States Army.

You must know that the making, distributing or selling of the subject records and the use of the Miller picture and name are entirely unauthorized and improper and infringe upon the rights of Mrs. Miller and the Miller estate.

In behalf of my client, demand is hereby made that you forthwith stop the production, distribution and/or sale of these illegal records; that all existing records be recalled and destroyed; and that you immediately account to my client for the proceeds of all sales of such records.

Your immediate reply is requested.

Very truly yours,

(signed) DAVID MACKAY

Exhibit B(2), Annexed to Foregoing Affidavit.

February 15, 1952

To All Phonograph Record Dealers:

It has come to my attention, as attorney for Mrs. Helen D. Miller, who is the widow of the late Glenn Miller and Executrix of his Estate, that two certain longplaying phonograph records marked "AFN" and which embody performances of the Glenn Miller orchestra and use the Glenn Miller picture and name are currently being offered for sale in local record shops. These records do not carry the name of any manufacturer and are very inferior in quality. They are illegal records made without the permission of the Glenn Miller estate from recordings of broadcasts of the Miller orchestra at the time Major Miller and the members of the orchestra were in the United States Army.

All record dealers are cautioned against possessing or selling any of these "bootleg" records, and the cooperation of all honest dealers is requested to the end that the unscrupulous persons who caused said records to be released may be apprehended.

Dealers who may have purchased these records in good faith are urged to furnish the writer with the name and address of the person, firm or corporation from whom any such purchase as made, together with any other information which may be helpful in tracking down the wrongdoers.

An accurrate list has been kept of the dealers to whom this letter is being sent. All dealers who continue to stock and/or sell AFN Glenn Miller records after receipt of this notice will be considered wilful infringers and will be named as co-defendants in actions for an accounting, injunction and damages.

Very truly yours,

(signed) David Mackay

Exhibit B(3), Annexed to Foregoing Affidavit.

February 5, 1954

Mr. Sam Goody,
235 West 49th Street,
New York City.

Dear Mr. Goody:

I have just been furnished with an affidavit establishing that on January 25, 1954 you were selling in your record shop at 235 West 49th Street two 10" long playing phonograph record albums entitled "Major Glenn Miller and his AEF Orchestra," the record labels being marked "An A.F.N. Presentation."

You had these records in your shop in February, 1952 and on February 15, 1952 I put you on written notice that they were bootleg records and could not legally be sold.

In addition to the fact that the sale of these records infringes the rights of the Glenn Miller estate, such sale is also illegal for the reason that no copyright royalties on the selections recorded have been paid to the copyright proprietors, and none of the musicians (all of whom are members of the American Federation of Musicians) has been paid for his services.

Since you were given express written notice not to sell these records, you must now be considered a wilful infringer of the legal rights of all concerned.

As attorney for the Glenn Miller estate, I request that you or your attorney immediately contact me about this matter, and in the meantime I again demand that you forthwith cease the sale of these records.

Very truly yours,

(signed) David MacKay

Affidavit of Julian T. Abeles, in Support of Motion of Plaintiff Shapiro, Bernstein & Co., Inc.

(Record p to 414)

JULIAN T. ABELES, being duly sworn, says:

1. I am a member of the firm of Abeles & Bernstein, attorneys for the six music publisher plaintiffs in this action.

2. This affidavit is submitted in support of the application of each of said plaintiffs for summary judgment against defendants Portem Distributing, Inc. and Sam Goody, and more particularly for the award of a reasonable attorneys' fee to each of said plaintiffs against each of said defendants. For the purpose of brevity in my short form affidavit, attached to each of the companion applications of the other five music publisher plaintiffs, this affidavit is referred to and made a part thereof with the same force and effect as if attached thereto.

3. The following services have been rendered by my firm, in relation to the nine separate and distinct causes of action of said plaintiffs, since the matter was referred to my firm on March 31, 1954, by Harry Fox as the agent and trustee for said music publishers:

(1) Correspondence with Fulton Brylawski, Esquire, of Washington D. C. and procuring from him a copyright search in the office of the Register of Copyrights in respect to each of the nine copyrighted musical compositions of said music publishers and the pertinent certificates and photostats.

(2) Conferences with Harry Fox and with the respective representatives of said music publishers, and examination of their pertinent records and obtaining the required information and data.

(3) Conferences with counsel for the RCA Victor division of Radio Corporation of America, and with David Mackay, Esquire the attorney for plaintiff Helen D. Miller, Individually and as Executrix of the Estate of Alton G. (Major Glenn) Miller, and examination of various data and material furnished by them.

(4) Extensive examination of legal authorities, and preparation of memorandum of law for reference in drafting the respective causes of action of said plaintiffs.

(5) Drafting and revisions of the nine separate causes of action of said plaintiffs and preparation thereof in final form, and consultations with the attorney for said plaintiff Helen D. Miller relative to the preparation of her separate cause of action, comprising a total of forty-three mimeographed pages.

(6) Examination of the answers interposed by said defendants Portem Distributing, Inc. and Sam Goody, and examination of legal authorities relative to the allegations thereof.

(7) It was determined by counsel for all parties whose rights were affected, that it was essential to examine the defendant Joseph Krug, from whom said defendants Portem Distributing, Inc. and Sam Goody had purchased such infringing records, before a Special Master to be appointed for such purpose prior to the music publisher plaintiffs making their respective applications for summary judgment against said defendants Portem Distributing, Inc. and Sam Goody. The testimony adduced upon such examination and the books and records of said defendants Joseph Krug thereupon produced by him, concerning the details of the illegal transaction to which said other defendants were parties, are obviously material fac-

tors for the consideration of this Court upon the instant applications for summary judgment against said defendants Portem Distributing, Inc. and Sam Goody. Such testimony and evidence is set forth in the supporting affidavit of Harry Fox attached hereto. My firm was required to render the following services for the purpose of obtaining such testimony and evidence:

(a) Said defendant entered an appearance by an attorney, but failed to answer or otherwise defend. Such testimony and evidence could only be adduced before a Special Master appointed by this Court, subsequent to obtaining a default judgment in favor of each of the music publisher plaintiffs against said defendant, upon notice to his attorney. For such purpose, and to obtain a direction for said defendant to deliver up to the Special Master all matter for making such infringing records, motion papers were prepared and served, an examination was made of the pertinent legal authorities and a memorandum of law was prepared for submission to this Court, and I appeared and argued the respective applications before this Court. I subsequently examined the legal authorities cited in said defendant's memorandum, make a further examination of the pertinent legal authorities, and with the permission of this Court I prepared and submitted a supplemental memorandum of law. Upon the granting of the respective applications for judgment I prepared and procured the entry of an order thereon, granting injunctive relief, requiring said defendant to appear before a Special Master appointed by this Court for the purpose of his examination, and requiring the production of his books and records and the delivery up of such matter.

(b) I appeared before the Special Master for the purpose of the examination of said defendant, but he did not

appear and his default was noted. I thereupon had a certified copy of the order of this Court and a subpoena served upon said defendant. On the return date I again appeared before the Special Master for the purpose of the examination of said defendant, but again he did not appear and his default was noted.

(c) I thereupon prepared an order to show cause, affidavits and exhibits upon an application to this Court to punish said defendant for contempt, with a direction to the United States Marshal to arrest said defendant and hold him in bail conditioned for his appearance and further conditioned that he hold himself amenable to the orders of this Court, and examined the legal authorities and prepared and submitted a memorandum of law in support thereof. Said defendant was thereupon taken in custody and lodged in jail.

(d) I thereafter attended before the Special Master on two occasions and conducted the examination of said defendant.

(8) Preparation of the motion papers, affidavits and exhibits upon the instant applications of the respective music publisher plaintiffs for summary judgment against said defendants Portem Distributing, Inc. and Sam Goody, extensive examination of the legal authorities and preparation of supporting memorandum of law for submission to this Court, and required attendance in court upon the argument.

4. I can conservatively say that at least eight weeks were devoted to the services set forth in paragraph "3" supra.

5. By reason of the wilfull and appallingly illegal acts of said defendants Portem Distributing, Inc. and Sam

Goody, perpetrated in contemptuous disregard of the rights of said music publisher plaintiffs and others in interest, my firm has been called upon to render such extensive and extraordinary legal services preliminary to and upon the instant applications. It is therefore respectfully submitted, that under such circumstances an award of the following attorneys' fees to the respective moving plaintiffs, against each of said defendants Portem Distributing, Inc. and Sam Goody, would be reasonable:

Shapiro, Bernstein & Co. Inc.	$1,000.00
Gershwin Publishing Corporation	$1,000.00
Edward B. Marks Music Corporation	$1,000.00
Miller Music Corporation	$1,000.00
Lewis Music Publishing Company, Inc.	$1,000.00
Mutual Music Society, Inc. (Four causes of action)	$2,500.00

(Sworn to by Julian T. Abeles on January 23, 1956.)

Motion of Plaintiff Gershwin Publishing Corporation for Summary Judgment.

(Record pp. 415 to 416)

Plaintiff, Gershwin Publishing Corporation moves the Court in the above-entitled cause as follows:

That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in favor of said plaintiff and against each of defendants Sam Goody and Portem Distributing, Inc., adjudging that said plaintiff recover of each of said defendants the sum of $250.00, as the minimum amount recoverable under the Copyright Act for the infringement by each of said defendants of the copyright in the musical composition of said plaintiff entitled "SUMMERTIME", in addition to full costs against each of said defendants including a reasonable attorneys' fee to be allowed by the court to said plaintiff against each of said defendants, and for injunctive relief and the direction to forthwith deliver up on oath for destruction all infringing parts of instruments serving to reproduce mechanically said musical composition, being the relief demanded in the cause of action of said plaintiff set forth in the complaint herein; on the ground that there is no genuine issue as to any material fact and that said plaintiff is entitled to said judgment as a matter of law as against each of said defendants, as more fully appears from the affidavits of Harry Fox and Julian T. Abeles, attached hereto as "Exhibit A" and "Exhibit B" respectively.

Dated, New York, N. Y., January 23, 1956.

Affidavit of Harry Fox, in Support of Motion of Plaintiff Gershwin Publishing Corporation.

(Record pages 417 to 419)

HARRY FOX, being duly sworn, says:

1. This affidavit is submitted in support of the application of plaintiff Gershwin Publishing Corporation, (a music publisher) for summary judgment against defendants Sam Goody (who conducts a "cut-rate" retail store for the sale of phonograph records and other musical items) and Portem Distributing, Inc. (a distributor of phonograph records to certain retail dealers). The application is made in conjunction with like applications by the other five plaintiff music publishers. Each of the moving plaintiffs is one of the leading music publishers in the United States and each of the musical compositions, the subject matter of this action, is one of the principal compositions in the respective catalogues of said plaintiffs. All of the matters set forth in this affidavit are of my own personal knowledge.

2. For the purpose of brevity paragraphs "2" to "13" inclusive and paragraph "15" of my affidavit submitted in support of the companion application of Shapiro, Bernstein & Co., Inc., are hereby referred to and made a part hereof with the same force and effect as if incorporated herein, except that in paragraph "5" thereof the reference should be to this moving plaintiff's copyrighted composition entitled "SUMMERTIME", reproduced on the infringing record designated as "Volume 2", which with the jacket in which it is contained is marked "Exhibit A(2)". The respective answers interposed by defendants Portem Distributing, Inc. and Sam Goody, to the cause of action of this moving plaintiff, are the same as set forth in paragraph "13" of my said affidavit.

3. For the purpose of establishing the allegations in the cause of action of this moving plaintiff, Gershwin

Affidavit of Harry Fox, in Support of Motion of Plaintiff Gershwin Publishing Corporation.

Publishing Corporation, of which said defendants have denied knowledge, the following documents pertaining to said plaintiff's copyrighted musical composition entitled "SUMMERTIME", are hereto attached and made a part hereof:

(1) "Exhibit A(3)"—Photostat of certificate of the Register of Copyrights of the deposit by George Gershwin, pursuant to Section 13 of the Copyright Act, of two complete copies of the best edition thereof then published, accompanied by a claim to copyright, dated and identified as follows: "Date of publication Sept. 28, 1935. Copies received Oct. 3, 1935. Entry: Class E, pub., No. 50655".

(2) "Exhibit A(4)"—Photostat of assignment of said copyright mentioned in (1) supra, dated May 1, 1942, from Rose Gershwin as administratrix of the estate of said George Gershwin, then deceased, to said plaintiff Gershwin Publication Corporation, with annexed certificate of the Assistant Register of Copyrights, dated Jan. 18, 1954, of the recording thereof on January 13, 1943, book 499, pages 232-233.

(3) "Exhibit A(5)"—Certificate of the Clerk of the Surrogate's Court, New York County, dated January 20, 1956, of the granting by said Court on July 16, 1937 of Letters of Administration to Rose Gershwin on the goods, chattels and credits of George Gershwin late of said County, and that said Letters have not been revoked.

(4) "Exhibit A(6)"—Photostat of acknowledgement of the Register of Copyrights, dated May 7, 1948, of "Notice of Use On Mechanical Instruments", having been filed by said plaintiff Gershwin Publishing Corporation on May 7, 1948 accompanied by the required recording fee, pursuant to Section 1(e) of the Copyright Act.

(Sworn to by Harry Fox on January 23, 1956.)

Affidavit of Julian T. Abeles, in Support of Motion of Plaintiff Gershwin Publishing Corporation.

(Record pages 425 to 426)

JULIAN T. ABELES, being duly sworn, says:

1. I am a member of the firm of Abeles & Bernstein, attorneys for the six music publisher plaintiffs in this action.

2. For the purpose of brevity the affidavit of David Mackay, Esquire, the attorney for the plaintiff Helen D. Miller, Individually and as Executrix of the Estate of Alton G. Miller, Deceased, submitted in support of the companion application of plaintiff Shapiro, Bernstein & Co. Inc., is hereby referred to and made a part of this application with the same force and effect as if attached hereto.

3. Likewise for the purpose of brevity my affidavit, submitted in support of the said companion application of plaintiff Shapiro, Bernstein & Co., Inc., is hereby referred to and made a part of this application with the same force and effect as if attached hereto.

(Sworn to by Julian T. Abeles on January 23, 1956.)

Motion of Plaintiff Edward B. Marks Music Corporation for Summary Judgment.

(Record pages 427 to 428)

Plaintiff, EDWARD B. MARKS MUSIC CORPORATION moves the Court in the above-entitled cause as follows:

That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in favor of said plaintiff and against each of defendants Sam Goody and Porter Distributing, Inc., adjudging that said plaintiff recover of each of said defendants the sum of $250.00, as the minimum amount recoverable under the Copyright Act for the infringement by each of said defendants of the copyright in the musical composition of said plaintiff entitled "POINCIANA", in addition to full costs against each of said defendants including a reasonable attorneys' fee to be allowed by the court to said plaintiff against each of said defendants, and for injunctive relief and the direction to forthwith deliver up on oath for destruction all infringing parts of instruments serving to reproduce mechanically said musical composition, being the relief demanded in the cause of action of said plaintiff set forth in the complaint herein; on the ground that there is no genuine issue as to any material fact and that said plaintiff is entitled to said judgment as a matter of law as against each of said defendants, as more fully appears from the affidavits of Harry Fox and Julian T. Abeles, attached hereto as "Exhibit A" and "Exhibit B" respectively.

Dated, New York, N. Y., January 23, 1956.

Affidavit of Harry Fox, in Support of Motion of Edward B. Marks Music Publishing Corporation.

(Record pages 429 to 431)

HARRY FOX, being duly sworn, says:

1. This affidavit is submitted in support of the application of plaintiff Edward B. Marks Music Corporation (a music publisher) for summary judgment against defendants Sam Goody (who conducts a "cut-rate" retail store for the sale of phonograph records and other musical items) and Portem Distributing, Inc. (a distributor of phonograph records to certain retail dealers). The application is made in conjunction with like applications by the other five plaintiff music publishers. Each of the moving plaintiffs is one of the leading music publishers in the United States and each of the musical compositions, the subject matter of this action, is one of the principal compositions in the respective catalogues of said plaintiffs. All of the matters set forth in this affidavit are of my own personal knowledge.

2. For the purpose of brevity paragraphs "2" to "13" inclusive and paragraph "15" of my affidavit submitted in support of the companion application of Shapiro, Bernstein & Co. Inc., are hereby referred to and made a part hereof, with the same force and effect as if incorporated herein, except that in paragraph "5" thereof the reference should be to this moving plaintiff's copyrighted composition entitled "Poinciana", reproduced on the infringing record designated as "Volume 1" which with the jacket in which it is contained is marked "Exhibit A(1)". The respective answers interposed by defendants Portem Distributing, Inc. and Sam Goody, to the cause of action of this moving plaintiff, are the same as set forth in paragraph "13" of my said affidavit.

Affidavit of Harry Fox, in Support of Motion of Edward B. Marks Music Publishing Corporation.

3. For the purpose of establishing the material allegations in the cause of action of this moving plaintiff, Edward B. Marks Music Corporation, of which said defendants have denied knowledge, the following documents, pertaining to said plaintiff's copyrighted musical composition entitled "POINCIANA", are hereto attached and made a part hereof:

(1) "Exhibit A(3)"—Photostat of certificates of the Register of Copyrights of the deposit by said plaintiff Edward B. Marks Music Corporation, pursuant to Section 13 of the Copyright Act, of two complete copies of the best edition thereof, then published, accompanied by a claim of copyright, dated and identified as follows: "Date of publication June 22, 1936. Copies received June 23, 1936. Entry: Class E, pub. No. 55932."

(2) "Exhibit A(4)"—Certificate of the Assistant Register of Copyrights, dated April 26, 1954, with attached photostat of "Notice of Use On Mechanical Instruments", filed by said plaintiff Edward B. Marks Music Corporation on October 21, 1937 accompanied by the required recording fee, pursuant to Section 1 (e) of the Copyright Act.

(Sworn to by Harry Fox on January 23, 1956.)

Affidavit of Julian T. Abeles, in Support of Motion of Plaintiff Edward B. Marks Music Publishing Corporation.

(Record pp. 435 to 436)

JULIAN T. ABELES, being duly sworn, says:

1. I am a member of the firm of Abeles & Bernstein, attorneys for the six music publisher plaintiffs in this action.

2. For the purpose of brevity the affidavit of David Mackay, Esquire, the attorney for the plaintiff Helen D. Miller, Individually and as Executrix of the Estate of Alton G. Miller, Deceased, submitted in support of the companion application of plaintiff Shapiro, Bernstein & Co. Inc., is hereby referred to and made a part of this application with the same force and effect as if attached hereto.

3. Likewise for the purpose of brevity my affidavit, submitted in support of the said companion application of plaintiff Shapiro, Bernstein & Co., Inc., is hereby referred to and made a part of this application with the same force and effect as if attached hereto.

(Sworn to by Julian T. Abeles on January 23, 1956.)

Motion of Plaintiff Miller Music Corporation for Summary Judgment.

(Record pp. 437 to 438)

Plaintiff, Miller Music Corporation moves the Court in the above-entitled cause as follows:

That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in favor of said plaintiff and against each of defendants Sam Goody and Portem Distributing, Inc. adjudging that said plaintiff recover of each of said defendants the sum of $250.00, as the minimum amount recoverable under the Copyright Act for the infringement by each of said defendants of the copyright in the musical composition of said plaintiff entitled "GREAT DAY", in addition to full costs against each of said defendants including a reasonable attorneys' fee to be allowed by the court to said plaintiff against each of said defendants, and for injunctive relief and the direction to forthwith deliver up on oath for destruction all infringing parts of instruments serving to reproduce mechanically said musical composition, being the relief demanded in the cause of action of said plaintiff set forth in the complaint herein; on the ground that there is no genuine issue as to any material fact and that said plaintiff is entitled to said judgment as a matter of law as against each of said defendants, as more fully appears from the affidavits of Harry Fox and Julian T. Abeles, attached hereto as "Exhibit A" and "Exhibit B" respectively.

Dated, New York, N. Y., January 23, 1956.

Affidavit of Harry Fox, in Support of Motion of Plaintiff Miller Music Corporation.

(Record pp. 439 to 441)

HARRY FOX, being duly sworn, says:

1. This affidavit is submitted in support of the application of plaintiff Miller Music Corporation (a music publisher) for summary judgment against defendants Sam Goody (who conducts a "cut-rate" retail store for the sale of phonograph records and other musical items) and Portem Distributing, Inc. (a distributor of phonograph records to certain retail dealers). The application is made in conjunction with like applications by the other five plaintiff music publishers. Each of the moving plaintiffs is one of the leading music publishers in the United States and each of the musical compositions, the subject matter of this action, is one of the principal compositions in the respective catalogues of said plaintiffs. All of the matters set forth in this affidavit are of my own personal knowledge.

2. For the purpose of brevity paragraphs "2" to "13" inclusive and paragraph "15" of my affidavit submitted in support of the companion application of Shapiro, Bernstein & Co., Inc., are hereby referred to and made a part hereof, with the same force and effect as if incorporated herein, except that in paragraph "5" thereof the reference should be to this moving plaintiff's copyrighted composition entitled "GREAT DAY" and reproduced on the infringing record designated as "Volume 1", which with the jacket in which it is contained is marked "Exhibit A(1)". The respective answers interposed by defendants Portem Distributing, Inc. and Sam Goody, to the cause of action of this moving plaintiff, are the same as set forth in paragraph "13" of my said affidavit.

Affidavit of Harry Fox, in Support of Motion of Plaintiff Miller Music Corporation.

3. For the purpose of establishing the material allegations in the cause of action of this moving plaintiff, Miller Music Corporation, of which said defendants have denied knowledge, the following documents, pertaining to said plaintiff's copyrighted composition entitled "GREAT DAY", are hereto attached and made a part hereof:

(1) "Exhibit A(3)"—Photostat of certificate of the Register of Copyrights, of the deposit by Vincent Youmans, Inc. pursuant to Section 13 of the Copyright Act, of two complete copies of the best edition thereof, then published, accompanied by a claim of copyright, dated and identified as follows: "Date of publication June 22, 1929. Copies received June 25, 1929. Entry: Class E, pub., No. 7048".

(2) "Exhibit A(4)"—Photostat of assignment of an interest in said copyright mentioned in (1) supra together with the sale and exclusive mechanical reproduction rights therein and thereto, dated March 16, 1932, from said Vincent Youmans, Inc. to said plaintiff Miller Music Corporation, with annexed certificate of the Register of Copyrights, dated April 28, 1954, of the recording thereof on October 11, 1932, book 292, page 253.

(3) "Exhibit A(5)"—Certificate of the Assistant Register of Copyrights, dated April 26, 1954, with attached photostat of "Notice Of Use On Mechanical Instruments", filed by said Vincent Youmans, Inc. on December 6, 1929 accompanied by the required recording fee, pursuant to Section 1(e) of the Copyright Act.

(Sworn to by Harry Fox on January 23, 1956.)

Affidavit of Julian T. Abeles, in Support of Motion of Plaintiff Miller Music Corporation.

(Record pp. 446 to 447)

JULIAN T. ABELES, being duly sworn, says:

1. I am a member of the firm of Abeles & Bernstein, attorneys for the six music publisher plaintiffs in this action.

2. For the purpose of brevity the affidavit of David Mackay, Esquire, the attorney for the plaintiff Helen D. Miller, Individually and as Executrix of the Estate of Alton G. Miller, Deceased, submitted in support of the companion application of plaintiff Shapiro, Bernstein & Co., Inc., is hereby referred to and made a part of this application with the same force and effect as if attached hereto.

3. Likewise for the purpose of brevity my affidavit, submitted in support of the said companion application of plaintiff Shapiro, Bernstein & Co., Inc., is hereby referred to and made a part of this application with the same force and effect as if attached hereto.

(Sworn to by Julian T. Abeles on January 23, 1956.)

Motion of Plaintiff Lewis Music Publishing Company, Inc. for Summary Judgment.

(Record pp. 448 to 449)

Plaintiff, Lewis Music Publishing Company, Inc. moves the Court in the above entitled cause as follows:

That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in favor of said plaintiff and against each of defendants Sam Goody and Portem Distributing, Inc., adjudging that said plaintiff recover of each of said defendants the sum of $250.00, as the minimum amount recoverable under the Copyright Act for the infringement by each of said defendants of the copyright in the musical composition of said plaintiff entitled "TUXEDO JUNCTION", in addition to full costs against each of said defendants including a reasonable attorneys' fee to be allowed by the court to said plaintiff against each of said defendants, and for injunctive relief and the direction to forthwith deliver up on oath for destruction all infringing parts of instruments serving to reproduce mechanically said musical composition, being the relief demanded in the cause of action of said plaintiff set forth in the complaint herein; on the ground that there is no genuine issue as to any material fact and that said plaintiff is entitled to said judgment as a matter of law as against each of said defendants, as more fully appears from the affidavits of Harry Fox and Julian T. Abeles, attached hereto as "Exhibit A" and "Exhibit B" respectively.

Dated, New York, N. Y., January 23, 1956.

Affidavit of Harry Fox, in Support of Motion of Plaintiff Lewis Music Publishing Company, Inc.

(Record pp. 450 to 452)

HARRY FOX, being duly sworn, says:

1. This affidavit is submitted in support of the application of plaintiff Lewis Music Publishing Company, Inc. (a music publisher) for summary judgment against defendants Sam Goody (who conducts a "cut-rate" retail store for the sale of phonograph records and other musical items) and Portem Distributing, Inc. (a distributor of phonograph records to certain retail dealers). The application is made in conjunction with like applications by the other five plaintiff music publishers. Each of the moving plaintiffs is one of the leading music publishers in the United States and each of the musical compositions, the subject matter of this action, is one of the principal compositions in the respective catalogues of said plaintiffs. All of the matters set forth in this affidavit are of my own personal knowledge.

2. For the purpose of brevity paragraphs "2" to "13", inclusive and paragraph "15" of my affidavit submitted in support of the companion application of Shapiro, Bernstein & Co., Inc., are hereby referred to and made a part hereof, with the same force and effect as if incorporated herein, except that in paragraph "5" thereof the reference should be to this moving plaintiff's copyrighted composition entitled "TUXEDO JUNCTION" reproduced on the infringing record designated as "Volume 2" which with the jacket in which it is contained is marked "Exhibit A(2)". The respective answers interposed by defendants Portem Distributing, Inc. and Sam Goody, to the cause of action of this moving plaintiff, are the same as set forth in paragraph "13" of my said affidavit.

Affidavit of Harry Fox, in Support of Motion of Plaintiff Lewis Music Publishing Company, Inc.

3. For the purpose of establishing the material allegations in the cause of action of this moving plaintiff, Lewis Music Publishing Company, of which said defendants have denied knowledge, the following documents, pertaining to said plaintiff's copyrighted composition entitled "TUXEDO JUNCTION" are hereto attached and made a part hereof:

(1) "Exhibit A(3)"—Photostat of certificate of the Register of Copyrights, of copyright by said plaintiff Lewis Music Publishing Company, Inc. pursuant to Section 12 of the Copyright Act of a work not reproduced for sale, by the deposit of one complete copy thereof on December 11, 1939, with claim of copyright, dated and identified as follows: "Entry: Class E., unp., No. 210582".

(2) "Exhibit A(4)"—Photostat of certificate of the Register of Copyrights, of the deposit by said plaintiff Lewis Music Publishing Company, Inc. pursuant to Section 13 of the Copyright Act, of two complete copies of the best edition thereof, then published, accompanied by a claim of copyright, dated and identified as follows: "Date of publication Feb. 21, 1940. Copies received Feb. 16, 1940. Entry: Class E, pub., No. 83133."

(3) "Exhibit A(5)"—Certificate of the Assistant Register of Copyrights, dated April 29, 1954, with attached photostat of "Notice of Use On Mechanical Instruments", filed by said plaintiff Lewis Music Publishing Company, Inc. on May 3, 1940 accompanied by the required recording fee, pursuant to Section 1(e) of the Copyright Act.

(Sworn to by Harry Fox on January 23, 1956.)

Affidavit of Julian T. Abeles, in Support of Motion of Plaintiff Lewis Music Publishing Company, Inc.

(Record pp. 457 to 458)

JULIAN T. ABELES, being duly sworn, says:

1. I am a member of the firm of Abeles & Bernstein, attorneys for the six music publisher plaintiffs in this action.

2. For the purpose of brevity the affidavit of David Mackay, Esquire, the attorney for the plaintiff Helen D. Miller, Individually, and as Executrix of the Estate of Alton G. Miller, Deceased, submitted in support of the companion application of plaintiff Shapiro, Bernstein & Co., Inc., is hereby referred to and made a part of this application with the same force and effect as if attached hereto.

3. Likewise for the purpose of brevity my affidavit, submitted in support of the said companion application of plaintiff Shapiro, Bernstein & Co., Inc., is hereby referred to and made a part of this application with the same force and effect as if attached hereto.

(Sworn to by Julian T. Abeles on January 23, 1956.)

Motion of Plaintiff Mutual Music Society, Inc. for Summary Judgment.

(Record pp. 459 to 460)

Plaintiff, Mutual Music Society, Inc. moves the Court in the above-entitled cause as follows:

That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in favor of said plaintiff and against each of defendants Sam Goody and Portem Distributing, Inc., adjudging that said plaintiff recover of each of said defendants the sum of $1,000.00, representing the minimum amount of $250.00 recoverable under the Copyright Act for the infringement by each of said defendants of the copyright in each of the musical compositions of said plaintiff entitled respectively, "AMERICAN PATROL", "SONG OF THE VOLGA BOATMAN", "ANVIL CHORUS" and "A STRING OF PEARLS", in addition to full costs against each of said defendants including a reasonable attorneys' fee to be allowed by the court to said plaintiff against each of said defendants, and for injunctive relief and the direction to forthwith deliver up on oath for destruction all infringing parts of instruments serving to reproduce mechanically said musical compositions, being the relief demanded in the respective causes of action of said plaintiff set forth in the complaint herein: on the ground that there is no genuine issue as to any material fact and that said plaintiff is entitled to said judgment as a matter of law as against each of said defendants, as more fully appears from the affidavits of Harry Fox and Julian T. Abeles, attached thereto as "Exhibit A" and "Exhibit B" respectively.

Dated, New York, N. Y., January 23, 1956.

Affidavit of Harry Fox, in Support of Motion of Plaintiff Mutual Music Society, Inc.

(Record pp. 461 to 465)

HARRY FOX, being duly sworn, says:

1. This affidavit is submitted in support of the application of plaintiff Mutual Music Society, Inc. (a music publisher) for summary judgment against defendants Sam Goody (who conducts a "cut-rate" retail store for the sale of phonograph records and other musical items) and Portem Distributing, Inc. (a distributor of phonograph records to certain retail dealers). The application is made in conjunction with like applications by the other five plaintiff music publishers. Each of the moving plaintiffs is one of the leading music publishers in the United States and each of the musical compositions, the subject matter of this action, is one of the principal compositions in the respective catalogues of said plaintiffs. All of the matters set forth in this affidavit are of my own personal knowledge.

2. For the purpose of brevity paragraph "2" to "13" inclusive and paragraph "15" of my affidavit submitted in support of the companion application of Shapiro, Bernstein & Co., Inc. are hereby referred to and made a part hereof, with the same force and effect as if incorporated herein, except that in paragraph "5" thereof the reference should be to the following copyrighted compositions of this moving plaintiff:

Title of Composition	*Infringing Record*	*Exhibit*
"AMERICAN PATROL"	"Volume 1"	A(1)
"SONG OF THE VOLGA BOATMAN"	"Volume 2"	A(2)
"ANVIL CHORUS"	"Volume 2"	A(2)
"A STRING OF PEARLS"	"Volume 1"	A(1)

The respective answers interposed by defendants Portem Distributing, Inc. and Sam Goody to the four causes of

action of this moving plaintiff, are the same as set forth in paragraph "13" of my said affidavit.

3. For the purpose of establishing the material allegations in the respective causes of action of this moving plaintiff, Mutual Music Society, Inc., of which said defendants have denied knowledge, the following documents, pertaining to this moving plaintiff's said copyrighted compositions are hereto attached and made a part hereof:

"American Patrol"—*First Cause of Action*

(1) "Exhibit A(3)"—Photostat of certificate of the Register of Copyrights, of the deposit by said plaintiff Mutual Music Society, Inc. pursuant to Section 13 of the Copyright Act, of two complete copies of the best edition thereof, then published, accompanied by a claim of copyright, dated and identified as follows: "Date of publication May 18, 1942. Copies received May 19, 1942. Entry: Class E pub. No. 104615".

(2) "Exhibit A(4)"—Photostat of "Notice of Use On Mechanical Instruments", filed by said plaintiff Mutual Music Society, Inc. on January 2, 1941 accompanied by the required recording fee, pursuant to Section 1(e) of the Copyright Act, with the endorsement thereon by the Register of Copyrights of the receipt and recording thereof on January 2, 1941, Vol. II, Page 151.

"Song of the Volga Boatman"—*Second Cause of Action*

(1) "Exhibit A(5)"—Photostat of certificate of the Register of Copyrights, of the copyright thereof by said plaintiff Mutual Music Society, Inc. under Section 12 of the Copyright Act of a work not reproduced for sale, by the deposit of one complete copy

thereof on December 16, 1940, with claim of copyright, dated and identified as follows: "Entry: Class E unp. No. 239723".

(2) "Exhibit A(6)"—Photostat of certificate of the Register of Copyrights, of the deposit by said plaintiff Mutual Music Society, Inc. pursuant to Section 13 of the Copyright Act, of two complete copies of the best edition thereof, then published, accompanied by a claim of copyright, dated and identified as follows: "Date of publication Mar. 17, 1941. Copies received Mar. 19, 1941. Entry: Class E pub. No. 93386."

(3) "Exhibit A(7)"—Photostat of "Notice of Use On Mechanical Instruments", filed by said plaintiff on May 19, 1942 accompanied by the required recording fee, pursuant to Section 1(e) of the Copyright Act, with the endorsement thereon by the Register of Copyrights of the receipt and recording thereof on May 19, 1942, Vol. 12, Page 182.

"Axvil Chorus"—*Third Cause of Action*

(1) "Exhibit A(8)"—Photostat of certificate of the Register of Copyrights, of the copyright thereof by said plaintiff Mutual Music Society, Inc. under Section 12 of the Copyright Act of a work not reproduced for sale, by the deposit of one complete copy thereof on October 15, 1940, with claim of copyright, dated and identified as follows: "Entry: Class E unp. No. 23[illegible]95."

(2) "Exhibit A(9)"—Photostat of certificate of the Register of Copyrights, of the deposit by said plaintiff Mutual Music Society, Inc. pursuant to Section 13 of the Copyright Act, of two complete copies of the best edition thereof, then published, accompanied by a claim of copyright, dated and identified as follows:

Affidavit of Harry Fox, in Support of Motion of Plaintiff Mutual Music Society, Inc.

"Date of publication Mar. 17, 1941. Copies received Mar. 10, 1941. Entry: Class E pub. No. 93385".

(3) "Exhibit A(10)"—Photostat of "Notice of Use On Mechanical Instruments", filed by said plaintiff Mutual Music Society, Inc. on January 2, 1941 accompanied by the required recording fee, pursuant to Section 1(e) of the Copyright Act, with the endorsement thereon by the Register of Copyrights of the receipt and recording thereof on January 2, 1941, Vol. 11, Page 151.

"String of Pearls"—*Fourth Cause of Action*

(1) "Exhibit A(11)"—Photostat of certificate of the Register of Copyrights, of the copyright thereof by said plaintiff Mutual Music Society, Inc. under Section 12 of the Copyright Act of a work not reproduced for sale, by the deposit of one complete copy thereof on August 8, 1941, with claim of copyright, dated and identified as follows: Entry: Class E unp. No. 266444".

(2) "Exhibit A(12)"—Photostat of certificate of the Register of Copyrights, of the deposit by said plaintiff Mutual Music Society, Inc. pursuant to Section 13 of the Copyright Act, of two complete copies of the best edition thereof, then published, accompanied by a claim of copyright, dated and identified as follows: "Date of Publication Jan. 2, 1942. Copies received Jan. 3, 1942. Entry: Class E pub. No. 100559."

(3) "Exhibit A(13)"—Photostat of acknowledgement by the Register of Copyrights, dated April 22, 1953, of "Notice Of Use On Mechanical Instruments" having been filed by said plaintiff Mutual Music Society, Inc. on April 22, 1953, accompanied by the required recording fee, pursuant to Section 1(e) of the Copyright Act.

(Sworn to by Harry Fox on January 23, 1956.)

Affidavit of Julian T. Abeles, in Support of Motion of Plaintiff Mutual Music Society, Inc.

(Record pp. 477 to 478)

JULIAN T. ABELES, being duly sworn, says:

1. I am a member of the firm of Abeles & Bernstein, attorneys for the six music publisher plaintiffs in this action.

2. For the purpose of brevity the affidavit of David Mackay, Esquire the attorney for the plaintiff Helen D. Miller, Individually and as Executrix of the Estate of Alton G. Miller, Deceased, submitted in support of the companion application of plaintiff Shapiro, Bernstein & Co., Inc., is hereby referred to and made a part of this application with the same force and effect as if attached hereto.

3. Likewise for the purpose of brevity my affidavit, submitted in support of the said companion application of plaintiff Shapiro, Bernstein & Co., Inc., is hereby referred to and made a part of this application with the same force and effect as if attached hereto.

(Sworn to by Julian T. Abeles on January 23, 1956.)

Cross Motion of Defendant Goody for Summary Judgment Against Plaintiff Shapiro, Bernstein & Co., Inc.

(Record pp. 479 to 480)

PLEASE TAKE NOTICE that on the annexed affidavits of Sam Goody and A. M. Lowenthal, sworn to the 9th day of February, 1956 and on the motion of the plaintiff, Shapiro, Bernstein & Co., Inc., for summary judgment against the defendant Goody and on all the other proceedings heretofore had herein, the undersigned will cross-move this court at the time and place at which the said motion of the plaintiff Shapiro, Bernstein & Co., Inc. is heard, for an order granting summary judgment in favor of the defendant, Sam Goody, and against the plaintiff, Shapiro, Bernstein & Co., Inc., pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint of the said plaintiff against the said defendant and granting to the said defendant such costs, allowances and other relief as to the Court may seem just and proper.

Dated at New York, February 9th, 1956.

Affidavit of Sam Goody, in Support of His Motion for Summary Judgment Against Plaintiff Shapiro, Bernstein & Co., Inc.

(Record pp. 481 to 495)

SAM GOODY, being duly sworn, says: I am one of the defendants in this action and submit this affidavit in opposition to the motions made by the six publisher-plaintiffs (that is, the plaintiffs other than Helen D. Miller) for summary judgment in favor of each of the said defendants and against me. This affidavit is also submitted in support of my cross motion for summary judgment in my favor and against each of the publisher-plaintiffs.

THE ACTION

1. The plaintiff, Helen D. Miller (not one of the moving parties here) is the widow of a professional musician and band leader known as Glenn Miller. Mrs. Miller claims the sole right to license and permit the recording on phonograph records of musical performances by her late husband.

2. The other plaintiffs are publishers of musical compositions with respect to which they claim to be the copyright proprietors.

3. The defendant Krug is, or was with respect to the phonograph records herein in issue, a manufacturer; the defendant Portem is a wholesaler and the other defendants including myself are retailers of phonograph records.

4. The complaint of the moving parties, the publisher-plaintiffs, is that the defendant Krug, without license, manufactured and sold two phonograph records containing transcriptions of performances of nine musical compositions, the copyrights of which they own. The complaints

admit that the compositions had been previously recorded by others licensed so to do and that therefore the defendant Krug was entitled to the compulsory license provided in such cases by the Copyright Act, but allege that he failed to file the requisite notice and to pay the statutory royalty fee, as a result of which it is claimed that the records manufactured and sold by Krug infringe the publishers' copyrights. The complaint further charges that I and the other defendants also infringed the copyrights when we sold the records in question in the course of our respective businesses.

5. My answer to the complaint was in effect a general denial of knowledge of the various allegations in the complaint.

THE FACTS

6. The main affidavit submitted in support of the motion is made by one Harry Fox who styles himself "the exclusive agent and trustee for over 300 of the leading music publishers in the United States", presumably including the publishers who are plaintiffs herein. Mr. Fox's affidavit substitutes for a statement of facts a conglomeration of name-calling, generalities, unsupported assertions, innuendos and references to other cases without demonstration of their relevancy or application to this action. Instead of presenting relevant facts to the Court, Mr. Fox tries to create an atmosphere inimical to me. I shall refer to Mr. Fox's affidavit in greater detail below.

7. The facts here involved are relatively simple. I operate a retail store in which I sell phonograph records and related merchandise. I have a store at 235 West 49th Street, in the Borough of Manhattan, City of New York

Affidavit of Sam Goody, in Support of His Motion for Summary Judgment Against Plaintiff Shapiro, Bernstein & Co., Inc.

and a warehouse and shipping room at 238 West 49th Street, New York, N. Y. I employ upwards of one hundred and twenty-five people in my business and sell records at retail not only over the counter but to mail order customers in all the states of the United States and in almost seventy foreign countries. My volume of sales is at the rate of almost five million dollars a year and I spend more than $100,000 each year in advertising. By the investment of money and by time and effort spent in developing my business, I have built up and enjoy a most valuable good will in all parts of the world.

8. In my business I sell more than one and a half million records each year. These records are manufactured by more than three hundred and sixty-five manufacturers, and I buy records from hundreds of manufacturers, distributors and wholesalers and also obtain many records by exchange with other retailers in the business. Because of the simplicity of the process involved in manufacturing long playing microgroove records, the manufacture of this product is no longer confined to a few large producers as it was in 1949, when there were but eleven manufacturers. Many small businessmen have entered the field so that the number of manufacturers whose records are on the market has increased more than thirty-three times in the last seven years. The product of the small manufacturers is in most cases as good as, and in some cases better than, that of the larger manufacturers. My customers request the products of all manufacturers and I maintain a complete stock of all records manufactured by everybody.

9. Accordingly, when in 1952 Mr. Krug, whom I had known as a person engaged in the retail end of the record business, told me that he was manufacturing records and

offered me the two records here in issue, I tested them, found them to be of acceptable quality and purchased from him about 150 of each number.

10. I did not and cannot, as the Court will readily see, and should not be requested to, undertake to determine whether a manufacturer in any case satisfies his royalty obligations to composers or publishers. Phonograph records are in a special category under the law. Retailers (whose profit per record is rarely as high as 30¢) know that a manufacturer of records is not dependent upon the copyright owner for an express license to record copyrighted musical compositions. The Congress has given such a manufacturer an automatic and compulsory license by the inclusion in the Copyright Act of Section 1(e). Policing of the royalty requirements of the Section and collection have never been placed and were not intended to be placed on the retailer by the Congress, and the law puts the obligation on the manufacturer. Retailers depend on these provisions. If the burden is placed on retailers, they, like myself, will be able to deal only with the very large organizations which can effectively indemnify them against lawsuits such as this one. The small manufacturer operating on a limited capital would soon be out of business, and the result which the Congress intended by automatic license to prevent would be brought about, for no retailer would deal with a record producer except upon onerous conditions of proof of license and indemnity.

11. Under the principle here sought to be established by the moving parties, the retailer, each time a phonograph record was offered to him, would be required to determine at his peril whether the musical composition recorded was

copyrighted or in the public domain; whether if copyrighted, it was copyrighted before 1909; whether it had ever been recorded before; whether the offered recording was an "arrangement" under the law; whether the manufacturer, who might or might not be the offerer, had filed the requisite notice in the Copyright Office and had sent the appropriate notice to the proprietor of the copyright; and whether the manufacturer was current in the payment of his royalty obligations. Surely, the Congress cannot be said to have intended such a result when it included the automatic and compulsory license provisions in the statute for the expressed purpose of preventing monopolization of the recording industry by the large manufacturers. It must have been intended that the retailer could act on the assumption that the manufacturer whose product he purchased had in all respects acted legally and had fulfilled the obligations imposed upon him by law, failing which he would be answerable to those to whom his obligations ran. Otherwise the law would be self-defeating.

12. The moving papers seem designed to impress the Court with the fact that notice was given to me long before the commencement of the action that Mr. Krug failed to pay the royalties which by statute he was responsible to pay to the copyright owners. But this is not the fact. In his affidavit in support of plaintiffs' motions, Mr. Fox relies on the affidavit of Mr. David Mackay, attorney for the plaintiff Helen D. Miller for the alleged notice. Mr. Mackay's affidavit shows that on February 15, 1952 he circulated a letter addressed to "All Phonograph Record Dealers" charging that the "A.F.N." records were "illegal records made without the permission of the Glenn Miller Estate" and were "bootleg". The dealers were urged not to handle the records.

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13. Mr. Mackay did not follow up his claim with any action whatsoever. After circulating his letter which left retailers with no means of ascertaining what the facts were, he was inactive for two years, until February 6, 1954, when he sent another letter making the same charges. The action itself was not begun until May, 1954.

14. In Mr. Mackay's 1954 letter he stated for the first time that the sale of these records "is also illegal for the reason that no copyright royalties on the selections recorded have been paid to the copyright proprietors." But Mr. Mackay does not indicate the source of his information nor his authority to speak for the copyright owners. It is apparent that for over two years prior to the commencement of this action the copyright owners, the publisher-plaintiffs and their agent and trustee, Mr. Fox (if he be such), took no steps whatsoever to warn anyone that statutory royalties had not been paid by Mr. Krug.

15. In any event, the moving parties have inexplicably concealed by failing to mention in their moving papers the facts most significant in this action. Prior to the service of the motion papers here, the royalties due on these records were paid by Mr. Krug and were accepted by the moving publisher-plaintiffs. I am advised by my counsel that it is the law in this district, and that it is also the law in this case (as a result of a decision of Hon. Archie O. Dawson, United States District Judge, filed herein November 4, 1954) that the royalties due from the manufacturer (Mr. Krug) to the publisher-plaintiffs could be paid at any time even during the pendency of the lawsuit and that this would free the records here involved of all copyright restrictions. This principle will be argued in the memorandum of law submitted by my counsel on the argument of the motion.

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16. The fact is that after the entry of judgment in this case in favor of the plaintiffs and against Mr. Krug, for royalties and damages in treble the amount of such royalties, all the plaintiffs accepted the sum of $2,000 from Mr. Krug in full settlement of the judgment and of all claims by all plaintiffs against Mr. Krug. A stipulation to that effect was executed by the plaintiffs and Mr. Krug, was filed in this Court and confirmed by order of this Court. By that stipulation, the plaintiffs and each of them released Mr. Krug from all claims whatsoever which they might have against him embraced in this lawsuit. Further, the Special Master, appointed by this Court to compute damages, reported to the Court that he was informed

> "* * * that proceedings were being had, participated in by the attorneys for the plaintiffs and Mr. Krug looking toward settlement of the claim for damages and royalties against him. Said settlement was consummated and on March 23, 1955, on consent of David Mackay, Esq., attorney for plaintiff Helen D. Miller individually, etc., and Abeles & Bernstein, attorneys for plaintiffs other than said Helen D. Miller, and Joseph Krug individually and doing business as A. F. N. Record Co., an order was filed settling the claim of plaintiffs for damages against said defendant Krug, withdrawing the motion to punish Joseph Krug for contempt and ordering me to deliver to Harry Fox, as agent and trustee for the plaintiffs, or to Abeles & Bernstein, attorneys for plaintiffs other than Helen D. Miller, the material heretofore delivered to me by Mr. Krug, and for other relief not pertinent here."

17. It is respectfully submitted that in the circumstances, the records purchased by me from Krug and sold

in my business were not infringing records but were covered by the compulsory license provisions of the Copyright Act and are, as the statute says free "from further contribution to the copyright owner."

THE MOVING PAPERS

18. The papers submitted in support of plaintiffs' motions do not address themselves to the relevant facts, but endeavor to substitute for facts a general atmosphere of operations by the defendants on the edge or over the edge of respectability and an aura of doubtful practices. This is especially true of the main affidavit submitted by the plaintiffs and made by Mr. Fox.

19. For example, Mr. Fox, throughout his affidavit, refers to me as one who conducts a "cut-rate" retail store for the sale of phonograph records and other musical items. He does not attempt to explain the relevancy of the fact that in my business I sell phonograph records at prices which are competitive with those charged by others in the industry. Neither does he explain to the Court that in the phonograph record industry there are no "fixed prices" so that logically there cannot be "cut-rate" prices.

20. For further example, I point out to the Court Mr. Fox's references to "legitimate" recording companies without any attempt to define the term he so strongly relies on. In paragraphs 3 and 4 of his affidavit, he talks at length about the "bootlegging" of phonograph records without any attempt to connect such practices to me. In paragraph 4 of his affidavit, Mr. Fox refers to "an-

scrupulous distributors and dealers" without definition or connection to this case. Similarly he charges that records are sometimes "palmed off" to the public by record dealers who "specialize in so-called 'cut-rate' operations" without daring to make the direct assertion against me which he knows to be untrue.

21. In paragraphs 6 and 7 he talks about the "invariable practice of every legitimate record manufacturer" to print on the record label and on the container his full name and address and contrasts the acts of the manufacturer of the records involved in this case whose label says "an A.F.N. presentation". I have asked my counsel to exhibit to the Court at the argument of this motion many records issued by well-known and long-established record companies which do not print names and addresses on the record labels and containers as Mr. Fox asserts they do. Similarly, in paragraph 7, Mr. Fox discusses other cases, unnamed, where wrongs were done according to his lights, but makes no attempt whatsoever to connect those cases with this one or to indicate any relevancy to the issues presented to the Court by the motions.

22. In paragraph 12, Mr. Fox again goes on at length about other unnamed cases where, as he terms it, there were "illegal operations" and "under the counter transactions", etc. Mr. Fox does not attempt to relate those cases to this one and fails to mention to the Court that in this action the records which were sold to me and other retailers by the manufacturer were advertised to the public, in at least one instance by a half page advertisement placed by the manufacturer in a catalogue of phonograph records (the Long Player Catalogue) which is distributed to more than twenty-five thousand people each month.

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23. Throughout his affidavit, Mr. Fox refers to the records here involved as "infringing" records, but does not advise the Court in what manner they are alleged to infringe nor what rights they infringe. It is respectfully submitted that the records do not infringe the copyright owner's rights, since the latter have accepted royalties in full from the manufacturer. We are not here concerned with rights of other persons.

24. In paragraph 9, Mr. Fox states that RCA-Victor, since 1938, has had the exclusive right to produce records of the performances of Glenn Miller which are here involved, but this assertion assumes the very issue before this Court in the cause of action of the plaintiff, Helen D. Miller, which cause of action has not been brought on for trial by that plaintiff.

25. In paragraph 10 of his affidavit, Mr. Fox states that the recordings here involved were "of poor quality" and discouraged people from buying RCA-Victor records of the same performances and that sales of such RCA-Victor records "has thereby been greatly curtailed". This unsupported assertion is not in accordance with the facts. During the time that the recordings here in issue were on the market I found no curtailment of sales of the RCA-Victor records in my store.

26. In paragraph 12 of his affidavit, Mr. Fox paraphrases without quotation, the testimony of defendant Krug. The paraphrased sentences are not accurate statements of Mr. Krug's testimony and are offered in a "shot-gun" technique which would appear to make Mr. Krug's statements about particular people applicable to all the defendants. In any event, the use by Mr. Fox

of the Krug testimony, or of any information contained therein is improper in that it was obtained by the abuse of the process of this Court.

27. The file in this case shows that Mr. Krug, the manufacturer of the records and the defendant in this action, defaulted in answering and that judgment was taken against him by the plaintiffs. The Court allowed the plaintiffs a royalty of 2¢ per record manufactured by Krug and damages of 6¢ per record and designated a Special Master to take testimony as to the number of records manufactured by Mr. Krug so that the amount of the judgment could be computed. Mr. Krug defaulted in appearing before the Master and on the application of the plaintiffs, he was adjudged in contempt of court, arrested and jailed by the United States Marshal. Subsequently, he was released in bail and then apparently settled this action with the plaintiffs, as a "condition" of the settlement agreeing to testify before the Master (see page 14 of Transcript of Mr. Krug's testimony).

28. Mr. Krug's testimony consists of seventy-nine pages, very little of which show relation to the computation of damages. Most of the testimony elicited from Krug concerns attempts to obtain statements from Mr. Krug which could be used against me and the other defendants on this motion. After the testimony had gone on for fifty-two pages, the Special Master apparently tired of such questioning and the following colloquy took place:

> "The Special Master: Mr. Abeles, my job is a simple one here and I do not see much use for going into all of this now. We are just interested in the royalties, is that not right according to this order?
>
> "Mr. Abeles: Yes; but the point was that I would go into that question, if it pleases you—I am making

a motion for summary judgment against the other defendants and I want to check up on the amounts involved; that is the reason I have been asking him these questions. The amounts involved and the circumstances under which they were sold and *try to connect them in some way with these transactions.*" (Emphasis supplied)

"The Special Master: My duties are to take evidence and compute and ascertain and report to the Court the amount of royalties and damages to be awarded each of the plaintiffs against the defendant.

"Mr. Abeles: Could I just ask him one more question?

"The Special Master: Yes."

29. After this, Mr. Abeles asked five questions about Mr. Krug's relations with me causing the Special Master again to caution Mr. Abeles (page 54). Mr. Abeles persisted and asked three more questions before the matter was terminated (page 54).

30. I had never been given notice of this examination. I was not given an opportunity to cross-examine Mr. Krug and in all respects the testimony now attempted to be paraphrased by Mr. Fox in his affidavit was procured in an ex parte proceeding rather than by orderly procedure on appropriate notice to me.

THE CLAIM FOR COUNSEL FEES

31. Attached to the plaintiffs' moving papers is an affidavit by Mr. Julian Abeles, a member of the firm of attorneys for the publisher-plaintiffs wherein he seeks to support recovery from me of counsel fees of $7,500. The statement of services rendered by Mr. Abeles is

sketchy, and refers to considerable work done on matters not related to the claim against me. Thus, in subdivision 1 of paragraph 3 of his affidavit, Mr. Abeles seeks to be paid for correspondence with an attorney in Washington with respect to a copyright search of the nine copyrighted musical compositions here involved. Mr. Abeles does not point out the necessity for such a copyright search in view of the fact that he represents the owners of the copyrights, who must have had those records readily available in their offices, especially since the compositions are, according to Mr. Fox "the principal compositions in the respective catalogues of said plaintiffs." In subdivision 3, Mr. Abeles discusses conferences with counsel for RCA Victor Division of the Radio Corporation of America and with Mr. Mackay, attorney for plaintiff Miller. Although Mrs. Miller's alleged cause of action is joined in the complaint with those of Mr. Abeles' clients, there is no relationship between them and Mr. Abeles does not point out the necessity for such conferences nor the relationship to the causes of action by his clients against me. Similarly subdivision 5 relates to the 43 mimeographed pages of Mrs. Miller's cause of action and the work done thereon by Mr. Abeles. Presumably, at some point in this litigation, Mr. Mackay will also ask for counsel fees covering the same work for his client.

32. In subdivision 7, Mr. Abeles goes into some length as to his services to his clients with respect to their cause of action against Mr. Krug. But this cause of action is not related to that alleged against me. In any event Mr. Abeles and his clients settled their claims against Mr. Krug and they have already been paid for their services in this action so far as he is concerned.

Affidavit of Sam Goody, in Support of His Motion for Summary Judgment Against Plaintiff Shapiro, Bernstein & Co., Inc.

INJUNCTIVE RELIEF REQUESTED

33. As set forth in my answer, I purchased approximately 150 copies of each of the phonograph records manufactured by Mr. Krug. Practically all of these records were sold by me prior to the receipt of the February, 1954 letter from Mr. Mackay, recited above, only a few odd pieces remaining in stock at that time. At this time, I do not have any stock of the said phonograph records and since, as appears from the annexed affidavit of my counsel, the matrices etc. necessary for the manufacture of additional records are now in the possession of the plaintiffs and further manufacture of the records by Mr. Krug has been enjoined, there would seem to be no need for injunctive relief against acts which it is impossible for me to perform even if I were so disposed.

34. It would appear, therefore, that the publisher-plaintiffs have not shown to this Court such facts as would entitle them to summary judgment against me, but, on the contrary, the records on file in this Court show that the phonograph records which are the subject matter of this action are under the statute free from copyright charges. I respectfully submit that plaintiffs' motions should be denied and that my cross-motion for summary judgment against the publisher-plaintiffs should be granted with appropriate costs and allowances.

(Sworn to by Sam Goody on February 9, 1956.)

Affidavit of Abraham M. Lowenthal, in Support of Defendant Goody's Motion for Summary Judgment Against Plaintiff Shapiro, Bernstein & Co., Inc.

(Record pp. 496 to 500)

ABRAHAM M. LOWENTHAL, being duly sworn, says: I am a member of the firm of Telsey, Lowenthal, Rothenberg & Mason, attorneys for the defendant, Sam Goody. I am in charge of this action and fully familiar with the facts involved in the action and with the proceedings heretofore had. This affidavit is submitted in opposition to the motions of the six publisher-plaintiffs for summary judgment in their favor and against the defendant, Sam Goody, and in suport of the cross-motions of the said defendant for summary judgment against the said plaintiffs.

1. This action was commenced in May, 1954 by service of the summons on the defendants. The defendant, Sam Goody, interposed his answer consisting in effect of a general denial. Thereafter the case appeared on the Reserve Calendar of this Court for October, 1955 and January, 1956 but was adjourned at the request of the plaintiffs each time. It is now scheduled to appear on the Reserve Calendar of this Court for March, 1956.

2. The causes of action alleged on behalf of the publisher-plaintiffs set forth that they are proprietors of copyrights covering certain musical compositions, all of which had been previously recorded on phonograph records in accordance with appropriate licenses for that purpose. It is further charged that the defendant Krug issued two phonograph records containing transcriptions of performances of the said musical compositions but that the said defendant Krug did not file the notices required by the Copyright Act nor pay the royalties set forth in

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that Act and that therefore the records manufactured by the defendant Krug infringe the copyrights owned by the publisher-plaintiffs.

3. The causes of action charge that the other defendants sold the said phonograph records in the course of their respective businesses and that therefore these sellers infringed the copyrights.

4. The complaint seeks three forms of relief, that is (1) an injunction enjoining the infringement and the manufacture, distribution, vending, etc. of the phonograph records; (2) a requirement that the defendants deliver up for destruction all of the phonograph records and the matrices, plates, etc. and (3) damages.

5. The defendant Krug, the manufacturer of the records, defaulted in answering the complaint and in November, 1954, the publisher-plaintiffs applied to the Court for judgment granting all the relief requested in the complaint. This application came on before Hon. Archie O. Dawson, United States District Judge. A copy of his opinion was filed herein on November 4, 1954. The Court granted judgment to these plaintiffs and against Krug for an injunction, for royalties in the sum of 2¢ on each record manufactured plus damages of three times such amount plus taxable costs and reasonable counsel fees to be approved by the Court. Judge Dawson appointed a Special Master to ascertain the amount of royalties and damages to be awarded to such plaintiffs against said defendant.

6. However, Judge Dawson refused to require destruction of the matrices, plates, etc. holding on the basis of a case cited in the opinion that

Affidavit of Abraham M. Lowenthal, in Support of Defendant Goody's Motion for Summary Judgment Against Plaintiff Shapiro, Bernstein & Co., Inc.

> "* * * if, therefore, a party may at any time, even during an appeal, give notice that it intends to utilize a copyrighted musical composition in the making of records and to pay royalties thereon, there would seem to be no reason for a court to require the destruction of the devices necessary for the making of those records."

7. Instead, Judge Dawson ordered that the said matrices, etc. be handed up and delivered to the Special Master to be impounded by him pending the compliance by the defendant Krug with the judgment and the requirements of Section 1(e) of the Copyright Act.

8. In sum, Judge Dawson held that filing of the notice and payment of the royalties at any time during the pendency of the action or an appeal freed the phonograph records from the restrictions of the Copyright Act, all pursuant to Section 1(e) of the said Act.

9. The defendant Krug at first failed to appear before the Special Master to testify as required and on application of the plaintiffs, he was adjudged in contempt of court, apprehended by the Marshal, jailed and subsequently freed in bail. After these events, apparently Mr. Krug settled the claims against him with the plaintiffs, a condition of the settlement being that Mr. Krug would appear before the Special Master and testify.

10. Mr. Krug did so appear in February, 1955 and testified at length, partially with respect to the number of records manufactured, but mainly with reference to other defendants in the action. These other defendants were never notified of the hearing, were not present and were given no opportunity to cross-examine.

Affidavit of Abraham M. Lowenthal, in Support of Defendant Goody's Motion for Summary Judgment Against Plaintiff Shapiro, Bernstein & Co., Inc.

11. After the hearing before the Special Master, the plaintiffs filed with the Court a stipulation of settlement and dismissal of the action as against the defendant Krug. A copy of such stipulation, together with the order of this Court, made March 23, 1955 by Hon. Irving R. Kaufman, United States District Judge, are annexed hereto and made part hereof.

12. By this stipulation, the motion to punish Krug for contempt was withdrawn and the bail bond cancelled; Krug paid, and the plaintiffs accepted, the sum of $2,000; the plaintiffs released and forever discharged Krug, his heirs, etc.

> "• • • from all rights, claims, demands and causes of action of the plaintiffs and each of them and their successors and assigns against the defendant JOSEPH KRUG, arising out of, affecting or concerning the subject matter of the above entitled action and the said motion to punish the said defendant for contempt of court;"

13. Krug, on the other hand, similarly released the plaintiffs from all claims and conveyed to Harry Fox, as agent and trustee for the plaintiffs, all the matrices, etc. used in the making of the phonograph records.

14. In said stipulation, the attorneys for all the plaintiffs and Krug agreed that a stipulation would be entered into and filed

> "• • • discontinuing, with prejudice and without costs, both the above entitled action as against the defendant Joseph Krug and the counterclaim interposed therein by the defendant Joseph Krug against the plaintiff Helen D. Miller • • •."

Order Annexed to Foregoing Affidavit.

15. This stipulation was confirmed by order of the Court, copy of which is attached hereto. Thereafter, the Special Master filed his report reciting the facts of the settlement and discontinuance and the said report was confirmed by this Court.

(Sworn to by Abraham M. Lowenthal on February 9, 1956.)

Order Annexed to Foregoing Affidavit.

(Record pp. 501 to 503)

On reading and filing the annexed stipulation, dated March 21, 1955 of the attorney for the plaintiff Helen D. Miller, individually and as executrix of the estate of Alton G. Miller, deceased, Harry Fox, as agent and trustee for the plaintiffs other than Helen D. Miller individually etcetera, the attorneys for the plaintiffs other than Helen D. Miller individually etcetera, and the defendant Joseph Krug individually and doing business as A. F. N. Record Co., and the annexed stipulation dated March 21, 1955 of the attorney for the plaintiff Helen D. Miller individually etcetera, the attorneys for the plaintiffs other than Helen D. Miller individually etcetera and the defendant Joseph Krug individually etcetera, and on motion of Abeles & Bernstein, attorneys for the plaintiffs other than Helen D. Miller individually etcetera, it is

ORDERED

1. That the motion b aught on, by the plaintiffs other than Helen D. Miller individually etcetera by order to show cause dated February 1, 1955, to punish the defend-

ant Joseph Krug for contempt of this court for his failure and refusal (1) to obey the direction of the order of this court, made on November 23, 1954 and entered in the above entitled action on November 24, 1954, and (2) to appear before the Special Master Charles L. Sylvester, Esquire then and there to testify, as commanded by the civil subpoena issued by this court on December 10, 1954, be and hereby is withdrawn, and the bail bond in the sum of Three Thousand ($3,000.00) Dollars, of Citizens Casualty Co. of N. Y. dated February 8, 1955, furnished by said defendant pursuant to said order to show cause dated February 1, 1955, be and hereby is cancelled.

2. That the Special Master Charles L. Sylvester, Esquire forthwith deliver up to Harry Fox, as agent and trustee for the plaintiffs other than the plaintiff, Helen D. Miller individually etcetera, or to Abeles & Bernstein the attorneys for said plaintiffs, all parts of instruments serving to reproduce mechanically the copyrighted musical compositions entitled "IN THE MOOD", "SUMMERTIME", "POINCIANA", "GREAT DAY", "TUXEDO JUNCTION", "AMERICAN PATROL", "SONG OF THE VOLGA BOATMAN", "ANVIL CHORUS", and "A STRING OF PEARLS", the subject matter of the above entitled action, and all mothers, masters, tapes, discs, stampers, matrices, recordings, plates, dies, blocks and other means and matter for making such parts of instruments and the labels, jackets and other printed matter used in connection therewith or in relation thereto, (1) heretofore, of which hereafter may be, delivered up to the said Special Master pursuant to the said order of this court made on November 23, 1954 and entered in the above entitled action on November 24, 1954.

3. That both the above-entitled actions as against the defendant Joseph Krug individually etcetera, and the

counterclaim interposed in the answer therein of said defendant against the plaintiff Helen D. Miller individually etcetera, be and hereby are discontinued with prejudice and without costs to any of the parties as against the other or others, provided, however, that the injunction contained in the order of this court made on November 23, 1954 and entered in the above entitled action on November 24, 1954, against the defendant Joseph Krug, his agents and servants, shall permanently remain and continue in full force and effect; without prejudice to the prosecution of the above entitled action by the plaintiffs and each of them against the defendants and each of them, other than the defendant Joseph Krug individually et cetera, and such other defendants as hereafter may be made parties thereto.

Dated, New York, N. Y., March 23rd, 1955.

IRVING R. KAUFMAN,
United States District Judge.

Stipulation Annexed to Foregoing Affidavit.

(Record pp. 504 to 507)

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff Helen D. Miller individually and as executrix of the estate of Alton G. Miller deceased, the attorney for the said plaintiff, Harry Fox as agent and trustee for the plaintiffs other than Helen D. Miller individually etcetera, the attorneys for the plaintiffs other than Helen D. Miller individually etcetera, and the defendant Joseph Krug in person individually and doing business as A. F. N. Record Co., as follows:

Stipulation Annexed to Foregoing Affidavit.

1. That the motion brought on, by the plaintiffs other than Helen D. Miller individually etcetera, by order to show cause dated February 1, 1955, to punish the defendant Joseph Krug for contempt of the court for his failure and refusal (1) to obey the direction of the order of the court dated November 29, 1954, and (2) to appear before the Special Master Charles L. Sylvester, Esquire then and there to testify as commanded by the civil subpoena issued by the court on December 10, 1954, be and hereby is withdrawn, and that the bail bond in the sum of Three thousand ($3,000.00) dollars furnished by said defendant pursuant to said order to show cause dated February 1, 1955, be cancelled.

2. That upon the execution hereof the defendant Joseph Krug shall make payment to Harry Fox, as said agent and trustee, of the sum of two thousand ($2,000.00) dollars on account of the costs and expenses incurred by the plaintiffs, other than Helen D. Miller individually etcetera, in their proceedings herein against said defendant.

3. The plaintiffs and each of them hereby release and forever discharge the defendant Joseph Krug and his heirs, executors and administrators of and from all rights, claims, demands and causes of action of the plaintiffs and each of them and their successors and assigns against the defendant Joseph Krug, arising out of, affecting or concerning the subject matter of the above entitled action and the said motion to punish the said defendant for contempt of court; without prejudice to any and all rights, claims, demands and causes of action of the above named plaintiffs and each of them and their heirs, executors, administrators, successors and assigns against the defendants and each of them, other than the defendant Joseph Krug, and their heirs, executors, administrators,

successors and assigns, and against any and all others whatsoever or wheresoever, among all other things and without limitation arising out of, affecting or concerning the subject matter of the above entitled action; the above named plaintiffs and each of them hereby expressly excepting and reserving, and not hereby intending to settle, release or discharge or in any way affect, any rights, claims, demands or causes of action which they or any of them, or their heirs, executors, administrators, successors or assigns, may or can have against the defendants and each of them, other than the defendant Joseph Krug, and their heirs, executors, administrators, successors and assigns, and any and all others whatsoever and whomsoever, among all other things and without limitation, arising out of, affecting or concerning the subject matter of the above entitled action.

4. That the defendant Joseph Krug hereby bargains, sells, grants and conveys to Harry Fox, as said agent and trustee, free and clear of all rights, interests, claims liens and encumbrances, all parts of instruments serving to reproduce mechanically the copyrighted musical compositions entitled "IN THE MOOD", "SUMMERTIME", "POINCIANA", "GREAT DAY", "TUXEDO JUNCTION", "AMERICAN PATROL", "SONG OF THE VOLGA BOATMAN", "ANVIL CHORUS", and "A STRING OF PEARLS", the subject matter of the above entitled action, and all mothers, masters, tapes, discs, stampers, matrices, recordings, plates, dies, blocks and other means and matter for making such parts of instruments and the labels, jackets and other printed matter used in connection therewith or in relation thereto (1) heretofore, or which hereafter may be, delivered up to the Special Master Charles L. Sylvester, Esquire pursuant to the said order of the court dated November 23, 1954, all of which the said Special Master is hereby authorized to deliver up to Harry Fox, as said agent and trustee, and

Stipulation Annexed to Foregoing Affidavit.

(2) owned by or under the control of the defendant Joseph Krug and not delivered up to the said Special Master pursuant to the said order of the court.

5. That the defendant Joseph Krug hereby releases and forever discharges the plaintiffs and each of them and Harry Fox individually and as said agent and trustee and their respective agents, servants, employees and attorneys, and their respective heirs, executors, administrators, successors and assigns, of and from all rights, claims, demands and causes of action of the defendant Joseph Krug and his heirs, executors and administrators, against them and each of them, arising out of, affecting or concerning the subject matter of the above-entitled action and the said motion to punish the said defendant for contempt of court.

6. That simultaneously with the execution hereof the attorneys for the respective plaintiffs and the defendant Joseph Krug in person shall enter into a stipulation discontinuing, with prejudice and without costs, both the above entitled action as against the defendant Joseph Krug and the counterclaim interposed therein by the defendant Joseph Krug against the plaintiff Helen D. Miller individually etcetera, provided however, that the injunction contained in the said order of the court herein dated November 23rd, 1954, against the defendant Joseph Krug, his agents and servants, shall permanently remain and continue in full force and effect; without prejudice to the prosecution of the above entitled action by the plaintiffs against the defendants other than the defendant Joseph Krug and such other defendants as hereafter may be made parties thereto.

7. That an order may be entered in the above entitled action based upon any of the foregoing, without notice.

Dated, New York, N. Y., March 21, 1955.

Stipulation Annexed to Foregoing Affidavit.

(Record pp. 509 to 510)

IT IS HEREBY STIPULATED AND AGREED by and between the attorney for the plaintiff Helen D. Miller, individually and as executrix of the estate of Alton G. Miller, deceased, the attorneys for the plaintiffs other than the plaintiff Helen D. Miller individually etcetera, and the defendant Joseph Krug in person, that both the above entitled action as against the defendant Joseph Krug individually et cetera, and the counterclaim interposed in the answer therein of said defendant against the plaintiff Helen D. Miller individually etcetera, be discontinued with prejudice and without costs to any of the parties as against the other or others, provided, however, that the injunction contained in the order of the court made on November 23, 1954 and entered in the above entitled action on November 24, 1954, against the defendant Joseph Krug, his agents and servants, shall permanently remain and continue in full force and effect; without prejudice to the prosecution of the above entitled action by the plaintiffs and each of them against the defendants and each of them other than the defendant Joseph Krug individually etcetera and such other defendants as hereafter may be made parties thereto, and that an order to the foregoing effect may be entered by any party without notice.

Dated, New York, N. Y., March 21, 1955.

Cross Motion of Defendant Goody for Summary Judgment Against Gershwin Publishing Corporation.

(Record pp. 511 to 512)

PLEASE TAKE NOTICE that on the annexed affidavit of Sam Goody, sworn to the 9th day of February, 1956 and on the motion of the plaintiff, Gershwin Publishing Corporation, for summary judgment against the defendant Goody and on all the other proceedings heretofore had herein, the undersigned will cross-move this court at the time and place at which the said motion of the plaintiff Gershwin Publishing Corporation is heard, for an order granting summary judgment in favor of the defendant, Sam Goody, and against the plaintiff, Gershwin Publishing Corporation, pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint of the said plaintiff against the said defendant and granting to the said defendant such costs, allowances and other relief as to the Court may seem just and proper.

Dated at New York, February 9th, 1956.

Affidavit of Sam Goody, in Support of His Motion for Summary Judgment Against Plaintiff Gershwin Publishing Corporation.

(Record pp. 513 to 514)

Sam Goody, being duly sworn, says: I am one of the defendants in this action and submit this affidavit in opposition to the motion for summary judgment against me made by the plaintiff Gershwin Publishing Corporation and in support of my cross motion for summary judgment against the said plaintiff.

In connection with the motion for summary judgment made by the plaintiff, Shapiro, Bernstein & Co., Inc., and my cross motion against it, I submitted affidavits of myself and my counsel, Mr. A. M. Lowenthal, in which the relevant facts are set forth at length. The allegations of those affidavits apply with equal force on this motion and I respectfully request that those affidavits be read here.

(Sworn to by Sam Goody on
February 9, 1956.)

Cross Motion of Defendant Goody for Summary Judgment Against Plaintiff Edward B. Marks Music Corporation.

(Record pp. 515 to 516)

PLEASE TAKE NOTICE that on the annexed affidavit of Sam Goody, sworn to the 9th day of February, 1956 and on the motion of the plaintiff, Edward B. Marks Music Corporation, for summary judgment against the defendant Goody and on all the other proceedings heretofore had herein, the undersigned will cross-move this court at the time and place at which the said motion of the plaintiff Edward B. Marks Music Corporation is heard, for an order granting summary judgment in favor of the defendant, Sam Goody, and against the plaintiff, Edward B. Marks Music Corporation, pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint of the said plaintiff against the said defendant and granting to the said defendant such costs, allowances and other relief as to the Court may seem just and proper.

Dated at New York, February 9th, 1956.

Affidavit of Sam Goody, in Support of His Motion for Summary Judgment Against Plaintiff Edward B. Marks Music Corporation.

(Record pp. 517 to 518)

SAM GOODY, being duly sworn, says: I am one of the defendants in this action and submit this affidavit in opposition to the motion for summary judgment against me made by the plaintiff Edward B. Marks Music Corporation and in support of my cross motion for summary judgment against the said plaintiff.

In connection with the motion for summary judgment made by the plaintiff, Shapiro, Bernstein & Co., Inc., and my cross motion against it, I submitted affidavits of myself and my counsel, Mr. A. M. Lowenthal, in which the relevant facts are set forth at length. The allegations of those affidavits apply with equal force on this motion and I respectfully request that those affidavits be read here.

(Sworn to by Sam Goody on
February 9, 1956.)

Cross Motion of Defendant Goody for Summary Judgment Against Plaintiff Miller Music Corporation.

(Record pages 519 to 520)

PLEASE TAKE NOTICE that on the annexed affidavit of Sam Goody, sworn to the 9th day of February, 1956 and on the motion of the plaintiff, Miller Music Corporation, for summary judgment against the defendant Goody and on all the other proceedings heretofore had herein, the undersigned will cross-move this court at the time and place at which the said motion of the plaintiff Miller Music Corporation is heard, for an order granting summary judgment in favor of the defendant, Sam Goody, and against the plaintiff, Miller Music Corporation, pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint of the said plaintiff against the said defendant and granting to the said defendant such costs, allowances and other relief as to the Court may seem just and proper.

Dated at New York, February 9th, 1956.

Affidavit of Sam Goody, in Support of His Motion for Summary Judgment Against Plaintiff Miller Music Corporation.

(Record pages 521 to 522)

SAM GOODY, being duly sworn, says: I am one of the defendants in this action and submit this affidavit in opposition to the motion for summary judgment against me made by the plaintiff Miller Music Corporation and in support of my cross motion for summary judgment against the said plaintiff.

In connection with the motion for summary judgment made by the plaintiff, Shapiro, Bernstein & Co., Inc., and my cross motion against it, I submitted affidavits of myself and my counsel, Mr. A. M. Lowenthal, in which the relevant facts are set forth at length. The allegations of those affidavits apply with equal force on this motion and I respectfully request that those affidavits be read here.

(Sworn to by Sam Goody on February 9, 1956.)

Cross Motion of Defendant Goody for Summary Judgment Against Plaintiff Lewis Music Publishing Company, Inc.

(Record pages 523 to 524)

PLEASE TAKE NOTICE that on the annexed affidavit of Sam Goody, sworn to the 9th day of February, 1956 and on the motion of the plaintiff, Lewis Music Publishing Company, Inc. for summary judgment against the defendant Goody and on all the other proceedings heretofore had herein, the undersigned will cross-move this court at the time and place at which the said motion of the plaintiff Lewis Music Publishing Company, Inc., is heard, for an order granting summary judgment in favor of the defendant, Sam Goody, and against the plaintiff, Lewis Music Publishing Company, Inc., pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint of the said plaintiff against the said defendant and granting to the said defendant such costs, allowances and other relief as to the Court may seem just and proper.

Dated at New York, February 9th, 1956.

Affidavit of Sam Goody, in Support of His Motion for Summary Judgment Against Plaintiff Lewis Music Publishing Company, Inc.

(Record pages 525 to 526)

SAM GOODY, being duly sworn, says: I am one of the defendants in this action and submit this affidavit in opposition to the motion for summary judgment against me made by the plaintiff Lewis Music Publishing Company, Inc., and in support of my cross motion for summary judgment against the said plaintiff.

In connection with the motion for summary judgment made by the plaintiff, Shapiro, Bernstein & Co., Inc., and my cross motion against it, I submitted affidavits of myself and my counsel, Mr. A. M. Lowenthal, in which the relevant facts are set forth at length. The allegations of those affidavits apply with equal force on this motion and I respectfully request that those affidavits be read here.

(Sworn to by Sam Goody on February 9, 1956.)

Cross Motion of Defendant Goody for Summary Judgment Against Plaintiff Mutual Music Society, Inc.

(Record pages 527 to 528)

PLEASE TAKE NOTICE that on the annexed affidavit of Sam Goody, sworn to the 9th day of February, 1956 and on the motion of the plaintiff, Mutual Music Society, Inc., for summary judgment against the defendant Goody and on all the other proceedings heretofore had herein, the undersigned will cross-move this court at the time and place at which the said motion of the plaintiff Mutual Music Society, Inc., is heard, for an order granting summary judgment in favor of the defendant, Sam Goody, and against the plaintiff, Mutual Music Society, Inc., pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint of the said plaintiff against the said defendant and granting to the said defendant such costs, allowances and other relief as to the Court may seem just and proper.

Dated at New York, February 9th, 1956.

Affidavit of Sam Goody, in Support of His Motion for Summary Judgment Against Plaintiff Mutual Music Society, Inc.

(Record pages 529 to 530)

SAM GOODY, being duly sworn, says: I am one of the defendants in this action and submit this affidavit in opposition to the motion for summary judgment against me made by the plaintiff Mutual Music Society, Inc., and in support of my cross motion for summary judgment against the said plaintiff.

In connection with the motion for summary judgment made by the plaintiff, Shapiro, Bernstein & Co., Inc., and my cross motion against it, I submitted affidavits of myself and my counsel, Mr. A. M. Lowenthal, in which the relevant facts are set forth at length. The allegations of those affidavits apply with equal force on this motion and I respectfully request that those affidavits be read here.

(Sworn to by Sam Goody on February 9, 1956.)

Cross Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Shapiro, Bernstein & Co., Inc.

(Record pages 531 to 532)

PLEASE TAKE NOTICE that on the annexed affidavits of Robert E. Pare and Morris B. Raucher, sworn to the 9th day of February 1956 and on the motion of the plaintiff, Shapiro, Bernstein & Co., Inc., for summary judgment against the defendant, Portem Distributing, Inc. and on all the other proceedings heretofore had herein, the undersigned will cross-move this Court at the time and place at which the said motion of the plaintiff, Shapiro, Bernstein & Co., Inc. is heard, for an order granting summary judgment in favor of defendant, Portem Distributing, Inc. and against plaintiff, Shapiro, Bernstein & Co., Inc., pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint of the said plaintiff against the said defendant and granting to the said defendant such costs, allowances and other relief as to the Court may seem just and proper.

Dated: New York, N. Y., February 9, 1956.

Affidavit of Robert E. Pare, in Support of Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Shapiro, Bernstein & Co., Inc.

(Record pages 533 to 537)

ROBERT E. PARE, being duly sworn, deposes and says:

(1) That I am the President of Portem Distributing, Inc., a co-defendant in the within action, and am fully familiar with all of the facts and circumstances herein.

(2) This affidavit is submitted in opposition to the motion made by plaintiff herein for summary judgment and is also submitted in support of my cross-motion for summary judgment in favor of defendant, Portem Distributing, Inc., and against said plaintiff, Shapiro, Bernstein & Co., Inc.

(3) Basically all of the pertinent facts have already been presented to this Court with the exception of those facts relating to the business of defendant, Portem Distributing, Inc.

(4) Portem Distributing, Inc. is a domestic corporation engaged for many years in the sale and distribution of phonographic records produced by various manufacturers. At present, said corporation is the exclusive distributor in the State of New York for approximately sixteen (16) record companies and of course is also engaged in selling records produced by other manufacturers. The corporation employs five (5) full-time salesmen and its gross annual sales exceed the sum of Five Hundred Thousand ($500,000.00) Dollars.

(5) Your deponent has read the affidavits submitted by Harry Fox on behalf of the plaintiff and with respect thereto wishes to set forth to this Court as follows:

Affidavit of Robert E. Pare, in Support of Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Shapiro, Bernstein & Co., Inc.

The aforesaid affidavit submitted in support of the motion for summary judgment is replete with unsupported assertions, general statements having no reference to the situation here at bar, innuendoes and is completely void of any definite facts relating to this matter. Fox, instead of setting forth the facts in this matter, has chosen to cloak himself with the veil of authority and instead of stating facts, has submitted an affidavit replete with nothing but conjecture and legal conclusions. He sets forth that he has resorted to seeking the sum of Two Hundred Fifty ($250.00) Dollars as a minimum recovery against each defendant for each infringement because of the difficulties he would encounter in proving the damages allegedly actually sustained by plaintiff herein. This, of course, would create a fine precedent for our Courts wherein a plaintiff might state to the Court that he only wants a nominal sum of money in any given instance because he did not want to go to the trouble and expense of proving a true cause of action. Such a situation should and could, of course, never exist.

(6) The use by Fox of language such as "bootlegging", "unscrupulous manufacturers and distributors", "cut rate operations" and "dealers who traffic in this type of record" is baseless and without meaning. It is noteworthy that he uses these terms in an extremely general manner and has not anywhere referred to any of the defendants herein by these words and expressions. This was carefully done, undoubtedly, to give the Court an erroneous impression with respect to the defendants herein.

(7) Fox further seeks to impress the Court with the fact that the failure to print the name of the manufacturer

on the label or jacket should lead to some inference of illegality. This statement is completely untrue. There are innumerable well known and long established record companies who do not print their names and addresses on the record labels and jackets as Fox has asserted they do. My attorneys have advised me that the complaint served herein is predicated on the fact that defendant, Krug, without being licensed to do so, manufactured and sold certain phonographic records containing transcriptions of performances of nine (9) musical compositions, the copyrights of which are owned by the respective plaintiffs herein. There is an admission on the part of said plaintiff that these compositions had previously been recorded by others licensed to do so and therefore the defendant, Krug, was entitled to the compulsory license provided in such cases by the Copyright Act. The plaintiffs allege, however, that he failed to file the requisite notice and to pay the statutory royalty fee of two (2¢) cents per song. As a result thereof, it is claimed that the records manufactured and sold by Krug infringe the publishers' copyrights. The complaint further states that the co-defendants also infringed the copyrights when they sold the records in question in the course of our businesses.

There is likewise a complaint that the records sold by the various defendants were of an inferior quality. With respect to the latter assertion, no proof has been submitted by plaintiffs. In addition thereto, the statutes governing this situation makes no reference to the question of inferior reproductions. This makes this assertion completely immaterial.

(8) On or about February 14, 1952 your deponent was approached by Krug, whom I had known for a consider-

Affidavit of Robert E. Pare, in Support of Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Shapiro, Bernstein & Co., Inc.

able period of time and he offered to sell me the records in question. I knew Krug to be an employee of Colony Record & Radio Center and likewise knew him to be a manufacturer of records under his own label. I had no knowledge or reason to believe that the records which he offered for sale were of an illegal nature. Certainly, the fact that Krug was employed by one of our customers is completely immaterial and does not and cannot give rise to any inference of illegality since there are numerous instances where individuals employed in this industry are engaged on their own or jointly with others in the manufacture and distribution of records. As a matter of fact, this is true of one of our own employees who has for some period of time been engaged in the record manufacturing business. I did not at that time and could not undertake to determine whether the manufacturer in that instance or in any other instance had satisfied his royalty obligations to composers or publishers. A manufacturer of records is not dependent upon the copyright owner for an express license to record copyrighted musical compositions. Congress has given such a manufacturer an automatic and compulsory license by inclusion in the Copyright Act of Section 1(e). It is noteworthy that my total purchases from Krug consisted of Five Hundred Fifty (550) records. Each of the purchases was evidenced by a bill bearing the following name and address of the vendor:

"A.F.N. Record Co.
542 Sheepshead Bay Road
Brooklyn, New York"

Each of the invoices received in connection with these purchases were paid for by check drawn to the order of

Affidavit of Robert E. Pare, in Support of Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Shapiro, Bernstein & Co., Inc.

A.F.N. Record Co. Thereafter, in the ordinary course of our business, we sold these records and every sale was evidenced by a sales invoice which was recorded in the corporation's books of account. This certainly is not the procedure followed by one who traffics in illegal merchandise.

(9) I have read the entire affidavit submitted by Fox and I have fully discussed this matter with my counsel and I have been advised and do verily believe that the plaintiffs herein have not only failed to submit sufficient facts which would entitle them to the relief which they seek but that the contrary is true, that is, that they have failed to prove that they have any cause of action whatsoever.

Wherefore, your deponent respectfully prays that the plaintiff's motion for summary judgment be denied and that the defendant, Portem Distributing Inc.'s cross-motion for summary judgment in its favor be granted together with the costs and disbursements of this action.

(Sworn to by Robert E. Pare on February 9, 1956.)

Affidavit of Morris B. Raucher, in Support of Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Shapiro, Bernstein & Co., Inc.

(Record pages 538 to 543)

MORRIS B. RAUCHER, being duly sworn, deposes and says:

(1) That I am a member of the firm of Raucher & Leftoff, Esqs., attorneys for defendant, Portem Distributing, Inc.

(2) This affidavit is submitted in opposition to the motion made by the plaintiff herein for summary judgment and is likewise submitted in support of defendant, Portem Distributing, Inc.'s motion for summary judgment in its favor against plaintiff, Shapiro, Bernstein & Co., Inc.

(3) This action was commenced by the service of a summons and complaint in the month of May 1954 and although it appeared on the reserve calendar of this Court on at least two occasions, it was adjourned both times at the request of the plaintiff.

(4) The causes of action set forth in plaintiff's complaint charge generally that the defendants herein sold certain phonographic records in the course of their respective businesses and as a result of these sales infringed upon certain copyrights owned by the plaintiffs herein. These charges are predicated primarily on the failure of defendant, Joseph Krug, the manufacturer of the records in question, to pay the statutory royalties to the copyright owners. The aforesaid defendant, Krug, defaulted

in answering the complaint in this matter and an application was thereafter made by plaintiffs seeking the entry of a judgment against Krug. This application was granted and an order was made and entered granting judgment to the plaintiff herein and against Krug for an injunction, for royalties in the sum of Two (2¢) cents for each record manufactured plus damages of three (3) times such amount together with taxable costs and reasonable counsel fees to be approved by the Court. In addition thereto, Hon. Archie O. Dawson, United States District Judge, before whom the aforesaid application was made, held that the filing of the notice and payment due of the royalties at any time during the pendency of the action or any appeal taken in connection therewith, freed the phonographic records from the restrictions of the Copyright Act. This ruling is pursuant to Section 1(e) of the Act here in question.

(5) After several proceedings made necessary by the failure of Krug to appear at a hearing to determine the royalties due, a stipulation of settlement and dismissal of the action as against defendant, Krug, was entered into between him and the plaintiffs herein. By the terms of such stipulation, Krug paid and the plaintiffs accepted the sum of Two Thousand ($2,000.00) Dollars in full settlement of their claims. During the pendency of these proceedings against Krug, including the hearing had before the Special Master, none of the other defendants or their counsel were present, the plaintiff having failed to notify them of these proceedings and hearings thus no co-defendant herein had an opportunity to cross-examine either Krug or any other witness produced at these hear-

ings. This fact is brought to the attention of the Court to indicate that the co-defendants herein are in no way bound by the testimony given by Krug at these hearings. All of the allegations in the moving papers concerning such testimony is completely immaterial and irrelevant.

(6) In any event, Krug did pay the royalties due on the records here in question and this payment was accepted by the plaintiffs herein. Hon. Archie O. Dawson, having already ruled that the royalties due from the manufacturer to the copyright owner or publisher could be paid at any time even during the pendency of the law suit and this would free the records herein involved of all copyright restrictions, it would appear unequivocally that these records were no longer infringing records but were covered by the compulsory license provisions of the Copyright Act and are, as the statute clearly sets forth, free "from further contributions to the copyright owner".

(7) I should like to deal for a moment with the affidavit of David Mackay, attorney for Helen D. Miller, submitted as part of the plaintiff's moving papers herein. Mackay states that under date of February 6, 1952 he addressed a letter to defendant, Portem Distributing, Inc. He states further that on February 14, 1952 he had a telephone conversation with me concerning the contents of the aforesaid letter. The statements attributed to me me during the course of this telephone conversation cannot be correct in the light of what transpired thereafter. The record clearly shows and is not disputed in any way by the plaintiffs herein that the first purchase of records by defendant, Portem Distributing, Inc. from Krug was

made on February 14, 1952. It therefore appears extremely unlikely that I would advise my client to stop the purchase and sale of certain merchandise which he had never purchased. I did, however, have a telephone conversation with Mackay on or about June 10, 1954, which date was subsequent to the institution of the instant action. Pursuant to said telephone conversation I mailed to Mackay a letter containing all of the information which he had requested and a true copy of said letter is annexed hereto, made part hereof and marked Exhibit "A". This letter was sent to Mackay in an attempt to amicably dispose of this matter and in order to obtain a stipulation of discontinuance against defendant, Portem Distributing, Inc. Mackay has never replied to this letter.

(8) The affidavit of services as submitted by Julian T. Abeles, Esq., is on its face quite impressive. A detailed examination of same, however, reveals that it contains a long and extensive list of services which are not germaine to the issues at bar. In addition thereto, said affidavit of services sets forth at great length work that he performed in connection with the Krug matter. The defendants herein are in no way involved with respect to said matter and Abeles has undoubtedly been paid or should have been paid for the services by his client at the time of the disposition and settlement thereof. Lastly, this matter insofar as defendant, Portem Distributing, Inc., is concerned could and should have been disposed of in June 1954 when your deponent attempted to amicably dispose of same with Mackay in order to avoid the great deal of unnecessary litigation which subsequently followed. There was a burden on the part of plaintiff's counsel to

mitigate damages, assuming that there were any, and also to attempt to avoid unnecessary litigation and to not further clog the calendar of an already overburdened Court.

(9) In view of all the foregoing circumstances and particularly in view of the fact that Krug, the manufacturer of the records here in question, has paid during the pendency of this action the royalties allegedly due to the copyright owners, your deponent respectfully urges this Court to deny the relief sought by the plaintiff herein and to grant to defendant, Portem Distributing, Inc., summary judgment against plaintiff, Shapiro, Bernstein & Co., Inc. in its favor.

(Sworn to by Morris B. Raucher on February 9, 1956.)

Exhibit "A", Annexed to Foregoing Affidavit.

June 10, 1954

David Mackay, Esq.
52 Wall Street
New York 5, New York

RE: *Miller* v. *Goody, et al.*

Dear Sir:

Pursuant to our telephone conversation, please be advised as follows:

1. We are the attorneys for Portem Distributing, Inc., a co-defendant herein.

Exhibit "A", Annexed to Foregoing Affidavit.

2. That our client had the following transaction with A.F.N. Record Co. of 542 Sheepshead Bay Road, Brooklyn, New York.

2/14/52—400 records	$480.00
6/ 6/52— 50 records	50.00
7/26/52—100 records	100.00

3. In payment of the above transactions four checks were issued to the A.F.N. Record Co. Two of the cancelled vouchers were endorsed as follows:

A.F.N. Records
Joe Krug
Colony Record & Radio Center

The other two checks were endorsed as follows:

Joseph Krug
A.F.N. Record Co.
OK for Cash
R.E. Pare

These checks were delivered to Mr. Krug in person at the office of our client.

We also have in our possession the invoices issued by the A.F.N. Record Co. substantiating the aforementioned transactions.

The foregoing information comprises the complete extent of our client's participation in this matter.

In view of the fact that this information is furnished voluntarily, we respectfully urge that this action be discontinued as against Portem Distributing, Inc.

Very truly yours,

RAUCHER & LEFTOFF.

Cross Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Gershwin Publishing Corporation.

(Record pages 544 to 545)

PLEASE TAKE NOTICE that on the annexed affidavits of ROBERT E. PARE and MORRIS B. RAUCHER, sworn to the 9th day of February 1956 and on the motion of the plaintiff, Gershwin Publishing Corporation, for summary judgment against the defendant, Portem Distributing, Inc., and on all the other proceedings heretofore had herein, the undersigned will cross-move this Court at the time and place at which the said motion of the plaintiff, Gershwin Publishing Corporation, is heard, for an order granting summary judgment in favor of defendant, Portem Distributing, Inc. and against plaintiff, Gershwin Publishing Corporation, pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint of the said plaintiff against the said defendant and granting to the said defendant such costs, allowances and other relief as to the Court may seem just and proper.

Dated: New York, N. Y., February 9, 1956.

Affidavit of Robert E. Pare, in Support of Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Gershwin Publishing Corporation.

(Record pages 546 to 547)

ROBERT E. PARE, being duly sworn, deposes and says:

(1) That I am the President of Portem Distributing, Inc., one of the co-defendants herein, and am familiar with all of the facts and circumstances surrounding this matter.

(2) This affidavit is submitted in opposition to the motion made by plaintiff, Gershwin Publishing Corporation, and likewise submitted in support of defendant, Portem Distributing, Inc.'s cross-motion for summary judgment in its favor and against the aforesaid Gershwin Publishing Corporation.

(3) With respect to the instant motion, the issues involved herein are the same as those in the companion proceeding brought on by plaintiff, Shapiro, Bernstein & Co., Inc. The facts with relation to the instant motion are the same as those facts set forth in my affidavit sworn to the 9th day of February 1956 and submitted in connection with the proceeding wherein the aforesaid Shapiro, Bernstein & Co., Inc. moved for summary judgment and in which proceeding we cross-moved for summary judgment in our favor.

(4) It is respectfully requested, therefore, that this Court, in considering the present motion, accept and read my affidavit submitted in connection with the motion relating to Shapiro, Bernstein & Co., Inc.

(Sworn to by Robert E. Pare on February 9, 1956.)

Affidavit of Morris B. Raucher, in Support of Motion of Defendant Portem Distributing, Inc. Against Plaintiff Gershwin Publishing Corporation.

(Record pages 548 to 549)

MORRIS B. RAUCHER, being duly sworn, deposes and says:

(1) That I am a member of the firm of Raucher & Leftoff, Esqs., attorneys for defendant, Portem Distributing, Inc.

(2) That this affidavit is submitted in opposition to the motion made by plaintiff, Gershwin Publishing Corporation and likewise submitted in support of defendant, Portem Distributing, Inc.'s cross-motion for summary judgment in its favor against the aforesaid Gershwin Publishing Corporation.

(3) With respect to the instant motion, the issues involved herein are the same as those in the companion proceeding brought on by plaintiff, Shapiro, Bernstein & Co., Inc. The facts with relation to the instant motion are the same as those facts set forth in my affidavit sworn to the 9th day of February 1956 and submitted in connection with the proceeding wherein the aforesaid Shapiro, Bernstein & Co., Inc. moved for summary judgment and in which proceeding we cross-moved for summary judgment in our favor.

(4) It is respectfully requested, therefore, that this Court, in considering the present motion, accept and read my affidavit submitted in connection with the motion relating to Shapiro, Bernstein & Co., Inc.

(Sworn to by Morris B. Raucher on February 9, 1956.)

Cross Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Edward B. Marks Music Corporation.

(Record pages 550 to 551)

PLEASE TAKE NOTICE that on the annexed affidavits of Robert E. Pare and Morris B. Raucher, sworn to the 9th day of February 1956 and on the motion of the plaintiff, Edward B. Marks Music Corporation, for summary judgment against the defendant, Portem Distributing, Inc., and on all the other proceedings heretofore had herein, the undersigned will cross-move this Court at the time and place at which the said motion of the plaintiff, Edward B. Marks Music Corporation, is heard, for an order granting summary judgment in favor of defendant, Portem Distributing, Inc. and against plaintiff, Edward B. Marks Music Corporation, pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint of the said plaintiff against the said defendant and granting to the said defendant such costs, allowances and other relief as to the Court may seem just and proper.

Dated: New York, N. Y., February 9, 1956.

Affidavit of Robert E. Pare, in Support of Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Edward B. Marks Music Corporation.

(Record pages 552 to 553)

ROBERT E. PARE, being duly sworn, deposes and says:

(1) That I am the President of Portem Distributing, Inc., one of the co-defendants herein, and am familiar with all of the facts and circumstances surrounding this matter.

(2) This affidavit is submitted in opposition to the motion made by plaintiff, Edward B. Marks Music Corporation; and likewise submitted in support of defendant, Portem Distributing, Inc.'s cross-motion for summary judgment in its favor and against the aforesaid Edward B. Marks Music Corporation.

(3) With respect to the instant motion, the issues involved herein are the same as those in the companion proceeding brought on by plaintiff, Shapiro, Bernstein & Co., Inc. The facts with relation to the instant motion are the same as those facts set forth in my affidavit sworn to the 9th day of February 1956 and submitted in connection with the proceeding wherein the aforesaid Shapiro, Bernstein & Co., Inc. moved for summary judgment and in which proceeding we cross-moved for summary judgment in our favor.

(4) It is respectfully requested, therefore, that this Court, in considering the present motion, accept and read my affidavit submitted in connection with the motion relating to Shapiro, Bernstein & Co., Inc.

(Sworn to by Robert E. Pare on February 9, 1956.)

Affidavit of Morris B. Raucher, in Support of Motion of Defendant Portem Distributing, Inc. Against Plaintiff Edward B. Marks Music Corporation.

(Record pages 554 to 555)

MORRIS B. RAUCHER, being duly sworn, deposes and says:

(1) That I am a member of the firm of Raucher & Leftoff, Esqs., attorneys for defendant, Portem Distributing, Inc.,

(2) That this affidavit is submitted in opposition to the motion made by plaintiff, Edward B. Marks Music Corporation and likewise submitted in support of defendant, Portem Distributing, Inc.'s cross-motion for summary judgment in its favor against the aforesaid Edward B. Marks Music Corporation.

(3) With respect to the instant motion, the issues involved herein are the same as those in the companion proceeding brought on by plaintiff, Shapiro, Bernstein & Co., Inc. The facts with relation to the instant motion are the same as those facts set forth in my affidavit sworn to the 9th day of February 1956 and submitted in connection with the proceeding wherein the aforesaid Shapiro, Bernstein & Co., Inc., moved for summary judgment and in which proceeding we cross-moved for summary judgment in our favor.

(4) It is respectfully requested, therefore, that this Court, in considering the present motion, accept and read my affidavit submitted in connection with the motion relating to Shapiro, Bernstein & Co., Inc.

(Sworn to by Morris B. Raucher on February 9, 1956.)

Cross Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Miller Music Corporation.

(Record pages 556 to 557)

PLEASE TAKE NOTICE that on the annexed affidavits of Robert E. Pare and Morris B. Raucher, sworn to the 9th day of February 1956 and on the motion of the plaintiff, Miller Music Corporation, for summary judgment against the defendant, Portem Distributing, Inc., and on all the other proceedings heretofore had herein, the undersigned will cross-move this Court at the time and place at which the said motion of the plaintiff, Miller Music Corporation, is heard, for an order granting summary judgment in favor of defendant, Portem Distributing, Inc., and against plaintiff, Miller Music Corporation, pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint of the said plaintiff against the said defendant and granting to the said defendant such costs, allowances and other relief as to the Court may seem just and proper.

Dated: New York, N. Y., February 9, 1956.

Affidavit of Robert E. Pare, in Support of Motion of Defendant Portem Distributing, Inc. Against Plaintiff Miller Music Corporation.

(Record pages 558 to 559)

ROBERT E. PARE, being duly sworn, deposes and says:

(1) That I am the President of Portem Distributing, Inc., of the co-defendants herein, and am familiar with all of the facts and circumstances surrounding this matter.

(2) This affidavit is submitted in opposition to the motion made by plaintiff, Miller Music Corporation, and likewise submitted in support of defendant, Portem Distributing, Inc.'s cross-motion for summary judgment in its favor and against the aforesaid Miller Music Corporation.

(3) With respect to the instant motion, the issues involved herein are the same as those in the companion proceeding brought on by plaintiff, Shapiro, Bernstein & Co., Inc. The facts with relation to the instant motion are the same as those facts set forth in my affidavit sworn to the 9th day of February 1956 and submitted in connection with the proceeding wherein the aforesaid Shapiro, Bernstein & Co., Inc., moved for summary judgment and in which proceeding we cross-moved for summary judgment in our favor.

(4) It is respectfully requested, therefore, that this Court, in considering the present motion, accept and read my affidavit submitted in connection with the motion relating to Shapiro, Bernstein & Co., Inc.

(Sworn to by Robert E. Pare on February 9, 1956.)

Affidavit of Morris B. Raucher, in Support of Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Miller Music Corporation.

(Record pages 560 to 561)

MORRIS B. RAUCHER, being duly sworn, deposes and says:

(1) That I am a member of the firm of Raucher & Leftoff, Esqs., attorneys for defendant, Portem Distributing, Inc.

(2) That this affidavit is submitted in opposition to the motion made by plaintiff, Miller Music Corporation, and likewise submitted in support of defendant, Portem Distributing, Inc.'s cross-motion for summary judgment in its favor against the aforesaid Miller Music Corporation.

(3) With respect to the instant motion, the issues involved herein are the same as those in the companion proceeding brought on by plaintiff, Shapiro, Bernstein & Co., Inc. The facts with relation to the instant motion are the same as those facts set forth in my affidavit sworn to the 9th day of February 1956 and submitted in connection with the proceeding wherein the aforesaid Shapiro, Bernstein & Co., Inc., moved for summary judgment and in which proceeding we cross-moved for summary judgment in our favor.

(4) It is respectfully requested, therefore, that this Court, in considering the present motion, accept and read my affidavit submitted in connection with the motion relating to Shapiro, Bernstein & Co., Inc.

(Sworn to by Morris B. Raucher on February 9, 1956.)

Cross Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Lewis Music Publishing Company, Inc.

(Record pp. 562 to 563)

PLEASE TAKE NOTICE that on the annexed affidavits of Robert E. Pare and Morris B. Raucher, sworn to the 9th day of February, 1956 and on the motion of the plaintiff, Lewis Music Publishing Company, Inc., for summary judgment against the defendant, Portem Distributing, Inc., and on all the other proceedings heretofore had herein, the undersigned will cross-move this Court at the time and place at which the said motion of the plaintiff, Lewis Music Publishing Company, Inc., is heard, for an order granting summary judgment in favor of defendant, Portem Distributing, Inc., and against plaintiff, Lewis Music Publishing Company, Inc., pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint of the said plaintiff against the said defendant and granting to the said defendant such costs, allowances and other relief as to the Court may seem just and proper.

Dated: New York, N. Y., February 9, 1956.

Affidavit of Robert E. Pare, in Support of Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Lewis Music Publishing Company.

(Record pp. 564 to [illegible])

ROBERT E. PARE, being duly sworn, deposes and says:

(1) That I am the President of Portem Distributing, Inc., one of the co-defendants herein, and am familiar with all of the facts and circumstances surrounding this matter.

(2) This affidavit is submitted in opposition to the motion made by plaintiff, Lewis Music Publishing Company, Inc. and likewise submitted in support of defendant, Portem Distributing, Inc.'s cross-motion for summary judgment in its favor and against the aforesaid Lewis Music Publishing Company, Inc.

(3) With respect to the instant motion, the issues involved herein are the same as those in the companion proceeding brought on by plaintiff, Shapiro, Bernstein & Co., Inc. The facts with relation to the instant motion are the same as those facts set forth in my affidavit sworn to the 9th day of February, 1956 and submitted in connection with the proceeding wherein the aforesaid Shapiro, Bernstein & Co., Inc. moved for summary judgment and in which proceeding we cross-moved for summary judgment in our favor.

(4) It is respectfully requested, therefore, that this Court, in considering the present motion, accept and read my affidavit submitted in connection with the motion relating to Shapiro, Bernstein & Co., Inc.

(Sworn to by Robert E. Pare on February 9, 1956.)

Affidavit of Morris B. Raucher, in Support of Motion of Defendant Portem Distributing, Inc. Against Plaintiff Lewis Music Publishing Company, Inc.

(Record pp. 566 to 567)

MORRIS B. RAUCHER, being duly sworn, deposes and says:

(1) That I am a member of the firm of Raucher & Leftoff, Esqs., attorneys for defendant, Portem Distributing, Inc.

(2) That this affidavit is submitted in opposition to the motion made by plaintiff, Lewis Music Publishing Company, Inc. and likewise submitted in support of defendant, Portem Distributing, Inc.'s cross-motion for summary judgment in its favor against the aforesaid Lewis Music Publishing Company, Inc.

(3) With respect to the instant motion, the issues involved herein are the same as those in the companion proceeding brought on by plaintiff, Shapiro, Bernstein & Co., Inc. The facts with relation to the instant motion are the same as those facts set forth in my affidavit sworn to the 9th day of February, 1956 and submitted in conection with the proceeding wherein the aforesaid Shapiro, Bernstein & Co., Inc. moved for summary judgment and in which proceeding we cross-moved for summary judgment in our favor.

(4) It is respectfully requested, therefore, that this Court, in considering the present motion, accept and read my affidavit submitted in connetcion with the motion relating to Shapiro, Bernstein & Co., Inc.

(Sworn to by Morris B. Raucher on February 9, 1956.)

Cross Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Mutual Music Society, Inc.

(Record pp. 568 to 569)

Sirs:

PLEASE TAKE NOTICE that on the annexed affidavits of Robert E. Pare and Moris B. Raucher, sworn to the 9th day of February 1956 and on the motion of the plaintiff, Mutual Music Society, Inc., for summary judgment against the defendant, Portem Distributing, Inc. and on all the other proceedings heretofore had herein, the undersigned will cross-move this Court at the time and place at which the said motion of the plaintiff, Mutual Music Society, Inc., is heard, for an order granting summary judgment in favor of defendant, Portem Distributing, Inc. and against plaintiff, Mutual Music Distributing, Inc., pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing the complaint of the said plaintiff against the said defendant and granting to the said defendant such costs, allowances and other relief as to the Court may seem just and proper.

Dated: New York, N. Y., February 9, 1956.

Affidavit of Robert E. Pare, in Support of Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Mutual Music Society, Inc.

(Record pp. 570 to 571)

ROBERT E. PARE, being duly sworn, deposes and says:

(1) That I am the President of Portem Distributing, Inc., one of the co-defendants herein, and am familiar with all of the facts and circumstances surrounding this matter.

(2) This affidavit is submitted in opposition to the motion made by plaintiff, Mutual Music Society, Inc. and likewise submitted in support of defendant, Portem Distributing, Inc.'s cross-motion for summary judgment in its favor and against the aforesaid Mutual Music Society, Inc.

(3) With respect to the instant motion, the issues involved herein are the same as those in the companion proceeding brought on by plaintiff, Shapiro, Bernstein & Co., Inc. The facts with relation to the instant motion are the same as those facts set forth in my affidavit sworn to the 9th day of February 1956 and submitted in connection with the proceeding wherein the aforesaid Shapiro, Bernstein & Co., Inc. moved for summary judgment and in which proceeding we cross-moved for summary judgment in our favor.

(4) It is respectfully requested, therefore, that this Court, in considering the present motion, accept and read my affidavit submitted in connection with the motion relating to Shapiro, Bernstein & Co., Inc.

(Sworn to by Robert E. Pare on February 9, 1956.)

Affidavit of Morris B. Raucher, in Support of Motion of Defendant Portem Distributing, Inc. for Summary Judgment Against Plaintiff Mutual Music Society. Inc.

(Record pp. 572 to 573)

MORRIS B. RAUCHER, being duly sworn, deposes and says:

(1) That I am a member of the firm of Raucher & Leftoff, Esqs., attorneys for defendant, Portem Distributing, Inc.

(2) That this affidavit is submitted in opposition to the motion made by plaintiff, Mutual Music Society, Inc. and likewise submitted in suport of defendant, Portem Distributing, Inc.'s cross-motion for summary judgment in its favor against the aforesaid Mutual Music Society, Inc.

(3) With respect to the instant motion, the issues involved herein are the same as those in the companion proceding brought on by plaintiff, Shapiro, Bernstein & Co., Inc. The facts with relation to the instant motion are the same as those facts set forth in my affidavit sworn to the 9th day of February 1956 and submitted in connection with the proceeding wherein the aforesaid Shapiro, Bernstein & Co., Inc. moved for summary judgment and in which proceeding we cross-moved for summary judgment in our favor.

(4) It is respectfully requested, therefore, that this Court, in considering the present motion, accept and read my affidavit submitted in connection with the motion relating to Shapiro, Bernstein & Co., Inc.

(Sworn to by Morris B. Raucher on February 9, 1956.)

Reply Affidavit of Julian T. Abeles in Support of Plaintiffs' Motions and in Opposition to Defendants' Motions.

(Record pp. 574 to 586)

JULIAN T. ABELES, being duly sworn, says:

1. I am a member of the firm of Abeles & Bernstein, attorneys for the moving plaintiffs. This affidavit is submitted in reply to the affidavits submitted on behalf of defendants Sam Goody and Portem Distributing, Inc., upon these applications and upon their respective cross-motions for summary judgment. For the purpose of brevity, this affidavit is submitted on behalf of each of the moving plaintiffs. As set forth in the moving affidavit of Harry Fox, this action was instituted on behalf of the music publisher plaintiffs, at his instances as the exclusive agent and trustee for over three hundred of the leading music publishers in the United States including said plaintiffs. All of the matters set forth in this affidavit are of my own personal knowledge.

2. It is alleged in said affidavits that defendant Krug having made payment in full of the amount of his obligation to each of said plaintiffs, and having otherwise fully complied with the direction of Hon. Archie O. Dawson; that a general release having thereupon been executed and delivered to said defendant; and that an order having thereupon been made by Hon. Irving R. Kaufman dismissing the action as against defendants Krug; that said defendants were thereby released and discharged of their liability to said plaintiffs for their individual infringement of said plaintiffs' copyrights.

3. To support this untenable contention, partial quotations are made from various provisions, but in each in-

stance defendants deliberately omit the material provisions which completely dissipate such contention, viz:

(a) In the stipulation of settlement dated March 21, 1955, annexed to said affidavits, it is specifically provided:

(1) In paragraph "2", that payment of the sum of $2,000.00 by defendant Krug shall only be applied "*on account of the costs and expenses incurred by the plaintiffs*, other than Helen D. Miller individually, etcetera, *in their proceedings herein against said defendant.*"

(2) In paragraph "3", that the release and discharge of defendant Krug shall be "without prejudice to any and all rights, claims, demands and causes of action of the above named plaintiffs and each of them and their heirs, executors, administrators, successors and assigns *against the defendants and each of them, other than the defendant Joseph Krug* and their heirs, executors, administrators, successors and assigns, and against any and all others whatsoever or wheresoever, among all other things and without limitation arising out of, affecting or concerning the subject matter of the above entitled action; the above named plaintiffs and each of them *hereby expressly excepting and reserving, and not hereby intending to settle, release or discharge or in any way affect, any rights, claims, demands or causes of action* which they or any of them, or their heirs, executors, administrators, successors or assigns, may or can have *against the defendants and each of them, other than the defendant Joseph Krug*, and their heirs, executors, administrators, successors and assigns, and any and all others whatsoever and whosoever, *among all other things and without limitation, arising out of, affecting or concerning the subject matter of the above entitled action.*"

(3) In paragraph "6", that simultaneously with the execution thereof a stipulation should be entered into discontinuing the action as against defendant Krug "*without prejudice to the prosecution of the above entitled action* by the plaintiffs *against the defendants other than the defendant Joseph Krug* and such other defendants as hereafter may be made parties thereto."

(b) In the stipulation of discontinuance dated March 21, 1955, annexed to said affidavits, it is respectfully provided that the action shall be discontinued as against defendant Krug "*without prejudice to the prosecution of the above entitled action* by the plaintiffs and each of them *against the defendants and each of them other than the defendant Joseph Krug* individually etcetera and such other defendants as hereafter may be made parties thereto, and that an order to the foregoing effect may be entered by any party without notice."

(c) In the order of the Honorable Irving R. Kaufman dated March 23, 1955 entered upon said stipulation, annexed to said affidavits, it is specifically provided that the action is discontinued as against defendant Krug "*without prejudice to the prosecution of the above entitled action* by the plaintiffs and each of them against the defendants and each of them, *other than the defendant Joseph Krug* and such other defendants as hereafter may be made parties hereto."

(d) In the order made by Judge Dawson for default judgment in favor of each of said plaintiffs against defendant Krug, dated November 23, 1954, it is specifically provided:

(1) That each of plaintiffs shall recover from defendant Krug "a royalty of two cents on each record manufactured" and "a further sum of three times such amount

by way of damages, making a total of eight cents for each such record manufactured."

(2) That each of said plaintiffs "shall further recover from said defendant *its taxable costs* and *a reasonable counsel fee* to be hereafter allowed by the Court."

(3) That said defendant, "*pending further order of this Court*, be enjoined from infringing said musical copyrights of each said plaintiff the subject matter of each cause of action of said plaintiff herein, in any manner, and from manufacturing, distributing, vending, selling, marketing or otherwise disposing of any parts of instruments serving to reproduce mechanically said copyrighted musical compositions of each of said plaintiffs."

(4) That said defendant deliver up to the Special Master, for impounding, all matter for making the infringing records.

(5) "That upon satisfactory proof being presented to this Court that said defendant has *paid in full the amount of the final judgment* to be entered herein, *and has given the notice required to take advantage of the compulsory licensing provisions of the Copyright Act, the aforesaid injunction and impounding order may be lifted by the Court.*"

It is further provided that "*to enable the Court to enter such judgment*" that the matter be referred to a Special Master "to take evidence and compute and ascertain, and report to this Court, *the amount of royalties and damages to be awarded* to each of said plaintiffs against said defendant." As hereinafter set forth, because of the failure of said defendant to produce any books or records before the Special Master from which the number of records could be ascertained and a computation made for the purpose of the entry of such judgment, plaintiffs had no

other recourse than to accept the sum of $2,000.00 "*on account of the costs and expenses incurred*" by said plaintiffs "in their proceedings herein against said defendant", as provided in the stipulation of settlement, and to look to the other defendants for the minimum recovery of $250.00 against each of them for their infringement under the aforementioned reservation expressly made for such purpose. As no such judgment could be entered based upon the evidence adduced before the Special Master, plaintiffs were thereby prevented from ascertaining the royalties and damages to be paid by said defendant. Furthermore, *said defendant did not give the notice required to take advantage of the compulsory licensing provisions of the Copyright Act.* By reason thereof it is provided in the aforementioned order of Judge Kaufman, that the Special Master shall "forthwith deliver up to Harry Fox, as agent and trustee" for said plaintiffs or to the attorneys for said plaintiffs, "all parts of instruments serving to reproduce mechanically the copyrighted musical compositions" of said plaintiffs, and "all mothers, masters, tapes, discs, stampers, matrices, recordings, plates, dies, blocks and other means and matter for making such parts"; that the action be discontinued as against said defendant "*provided however, that the injunction* contained in the order of this Court made on November 23, 1954 and entered in the above entitled action on November 24, 1954" against said defendant "*shall permanently remain and continue in full force and effect*", and that the discontinuance thereof as to said defendant shall be "*without prejudice to prosecution of the above entitled action* by the plaintiffs and each of them *against the defendants and each of them, other than the defendant Joseph Krug.*"

Accordingly, the argument advanced by the defendants in opposition to plaintiffs' applications for summary judg-

ment that records purchased and sold by them "were not infringing records *but were covered by the compulsory license provisions of the Copyright Act* and are, as the statute says free 'from further contribution to the copyright owner'" *is based upon an entirely false premise.*

4. I conducted the examination of the defendant Krug before the Special Master. As appears from the deposition of said defendant on file in the clerk's office (a) at the first hearing he testified that all of his books and records, reflecting the number of phonograph records manufactured and the sales made by him, were then kept by him in a friend's apartment and would be produced at the adjourned hearing, (b) that upon the adjourned hearing said defendant produced only a sheet of paper, upon which he had made a few notations of some of the records manufactured and sold, (c) that while this was far from complete he could not recall the number of additional records manufactured or to whom such additional sales had been made, and (d) that he had never filed the required excise tax returns reflecting the number of records sold, and had never made any Federal, City or State tax payment. Under such circumstances plaintiffs had no means of ascertaining anything like the actual number of records manufactured and sold. It having further been developed that said defendant was judgment proof, it was not deemed advisable for said plaintiffs to incur additional substantial costs and expenses in further pursuing the matter to an uncollectable judgment against said defendant, for only a trivial part of the records actually manufactured and sold. Said plaintiffs therefore acceded to said defendants' offer, to pay the sum of $2,000.00 on account of such costs and expenses incurred to date, for which said defendant was obligated for payment under the order of Judge Dawson, apart from the eight cent pay-

ment in respect to each record manufactured. Accordingly, no part of said sum of $2,000.00 represented payment of any part of the two cent royalty or the six cent damages for which said defendant was obligated for payments in addition to such costs and expenses including attorneys' fees. Said plaintiffs expressly reserved the right to pursue their remedies against the other defendants so that they might thereby recoup at least a part of the recovery to which they are entitled. The said sum of $2,000.00 received from defendant Krug on account of said plaintiffs' costs and expenses was disbursed as follows:

Fee of Special Master, Charles L. Sylvester, Esquire	$ 500.00
Fee of Edward Grant, stenographer employed by the Special Master, for taking the testimony	125.00
Applied in payment of the disbursements of my firm incurred to the date thereof	291.37
Applied on account of the fee of my firm, for professional services rendered	1,083.63
Total	$2,000.00

Because of the failure of the defendant Krug to produce any books and records as aforesaid, from which the number of records could be ascertained and a computation made for the purpose of the entry of judgment, plaintiffs are relegated to the minimum recovery of $250.00 against each of the defendants upon this application, instead of the substantial recovery to which they are entitled.

5. In the affidavit of defendant Sam Goody (par. 22) it is said that an advertisement was placed by defendant Krug in a catalogue of long playing records, which was widely distributed. As appears from the deposition of defendant Krug taken before the Special Master, on file in the office of the Clerk of this Court (p. 75), this advertisement was inserted by defendant Goody *in a catalogue published and disseminated by him*, for which he deducted the sum of $90.00.

6. In the affidavit of Robert E. Pare, submitted on behalf of defendant Portem Distributing, Inc. (par. 8) it is said that each of the purchases made by said defendant from the defendant Krug was evidenced by a bill bearing the following name and address:

"A F N Record Co.
542 Sheepshead Bay Road
Brooklyn, New York."

It is noteworthy that no such bill is annexed to the said affidavit. Harry Fox in his moving affidavit refers to the deposition of defendant Krug, wherein he testified that he had no printed business cards, stationery or billheads, and that when a receipt was requested he stamped the above name and address with a rubber stamp on a blank receipt; the said address "542 Sheepshead Bay Road, Brooklyn", used by him being that of a vacant store; and that the name "A F N Record Co." coined by him for such purposes, "did *not appear in the New York telephone directory.*" None of the foregoing is denied by either of said defendants.

7. In the affidavit of defendant Sam Goody (par. 33) it is said that "as the matrices etc. necessary for the manufacture of additional records are now in the possession

of the plaintiffs and further manufacture of the records by Mr. Krug has been enjoined, there would seem to be no need for injunctive relief against acts which it is impossible for me to perform even if I were so disposed." However, the original acetate discs from which matrices were made, and the stampers made from the matrices and from which the records are pressed, were not delivered to the Special Master or the plaintiffs' attorneys pursuant to Judge Dawson's order. The defendant Krug testified before the Special Master that they were not then in his possession and that he could not obtain possession thereof. Furthermore, it is a simple process, regularly employed in such illegal operations, to make any number of new matrices either from an acetate disc or direct from a record. It has invariably been our experience in prosecuting this type of action, that regardless of the injunction against the original party disseminating such records, they continue to be disseminated by another source through the same distributors and dealers who specialize in the type of operation. Accordingly the only protection that the record manufacturers and music publishers can have, is injunctive relief against such distributors and dealers.

8. In the instant case the records are identified solely by the legend "An AFN Presentation." In the moving affidavit of Harry Fox (par. 6) it is said "The use of such an unknown specially coined purported trade name or mark, and the deliberate omission of both the name and address of the manufacture, is obviously an infallible earmark of an infringing record. As it puts all distributors and dealers on immediate notice that it is an infringing record, such records are only disseminated and sold, as aforesaid, by the distributors and dealers who traffic in this type of record." Mr. Fox further states in his affi-

davit (par. 9) that it has at all times since 1938 been well known in the trade, that the R. C. A. Victor division of Radio Corporation of America has had the exclusive right to manufacture and sell phonograph records of all performances of musical compositions by Glenn Miller. In the answering affidavits of both of said defendants it is said that counsel for said defendants will exhibit to the Court upon the argument, many records issued *by well known and long established record companies*, which do not print their names and addresses on the record labels and containers. This is just the point that Mr. Fox has made, that the use of an "*unknown specially coined purported trade name or mark*", together with the omission of "*both the name and address of the manufacturer*", is an infallible earmark of an infringing record.

9. It is said in the answering affidavits of both defendants (a) that a distributor or dealer who is an innocent infringer cannot be held liable for the purchase and resale of the infringing items, and (b) that in any event it was never the intention of the Copyright Act to hold a distributor or dealer liable for damages separate and apart from the manufacturer. Under the authorities cited in plaintiffs' memorandum, it has been unqualifiedly established that intent to infringe is wholly immaterial in assessing liability and that each infringer is liable for its individual infringement. The facts set forth in the moving affidavit of Harry Fox and their denial in certain instances in the answering affidavits, have no possible bearing upon the determination of these applications by plaintiffs for summary judgment, other than to apprise the Court of the purpose of plaintiffs and others in interest in prosecuting these and like actions, with the time and effort involved and at a substantial cost, for a minimum recovery of $250.00 against each defendant for each in-

fringement. The Court will take judicial notice of innumerable like actions prosecuted throughout the United States for the same purpose, by the American Society of Composers, Authors And Publishers, where its recovery has likewise been in the minimum statutory sum.

APPLICATION FOR A REASONABLE ATTORNEYS' FEE AS A PART OF EACH OF SAID PLAINTIFFS' COSTS

10. It is said in the answering affidavits, that counsel should not be paid for engaging the services of Fulton Brylawski, Esquire of Washington, D. C. for making a copyright search and furnishing the requisite material for use in these proceedings. In a period of over thirty years I have specialized in prosecuting and defending copyright infringement actions for such clients among others, as Loew's Incorporated, Twentieth Century-Fox Film Corporation, Universal Pictures Co. Inc., Music Corporation of America, and Harry Fox as agent and trustee for over three hundred of the leading music publishers in the United States. In every instance I have engaged the services of an attorney, who is particularly qualified in that field, to furnish me with a complete copyright search and the pertinent certificates, certified copies and photostats, before the preparation of a complaint or answer. I have invariably found that the sketchy information and data in the files of a client can never be relied upon for such purpose. It is further said that my conferences with counsel for the R. C. A. Victor Division of Radio Corporation of America and for plaintiff Miller, have no bearing upon the application for attorneys' fees. On the contrary they made the essential preliminary investigations and obtained the material data for the institution of suit by the music publisher plaintiffs. Furthermore, it was advisable that the cause of action of plaintiff Miller

should conform in certain respects to that of the other plaintiffs, which required the rendition of my services in connection with the preparation of his cause of action. It is further said that my services rendered in obtaining the appearance of defendant Krug before the Special Master and the taking of his deposition, have no bearing upon these proceedings against said defendants. On the contrary, as set forth on my moving affidavit (par. 7) certain material information for use upon these applications could only be obtained through the examination of said defendant. Furthermore, in the answering affidavit of defendant Sam Goody (par. 28) there is the following quotation from the minutes of the hearings before the Special Master, which speaks for itself:

> "The Special Master: Mr. Abeles, my job is a simple one here and I do not see much use for going into all of this now. We are just interested in the royalties, is that not right according to this order?
>
> "Mr. Abeles: Yes; but the point was that I would go into that question, if it please you—I am making a motion for summary judgment against the other defendants and I want to check up on the amounts involved; that is the reason I have been asking him these questions. The amounts involved and the circumstances under which they were sold and try to connect them in some way with these transactions."

It is therefore respectfully submitted, that the respective motions of said plaintiffs for summary judgment against each of said defendants and for a reasonable attorneys' fee as a part of its costs, should be granted, and that the respective motions of said defendants for summary judgment should be denied.

(Sworn to by Julian T. Abeles on February 13, 1956.)

Opinion and Judgment.

(Record pages 587 to 616)

IRVING R. KAUFMAN, D. J.

Some time in 1951, defendant Joseph Krug, a phonograph record salesman, came into possession of certain acetate disks recording propaganda radio broadcasts made by Glenn Miller and orchestra when Mr. Miller was a major in the United States Army during World War II. Krug tape-recorded the selections on those disks, and from the tapes he made the matrices, plates, molds, stamps, etc., necessary for the manufacture of records; then, doing business as the A. F. N. Record Company, he commenced to manufacture and sell two ten inch long-play records of the Miller performance. The jackets in which the records were sold carried a picture of Glenn Miller in his army uniform and the captions, "Major Glenn Miller and His A. E. F. Orchestra", "An AFN Presentation". The labels on the records themselves were similarly captioned.

Of the thirteen musical selections contained on both of these records, nine were copyrighted musical works whose copyrights were held by various musical publishers.[1] These copyright proprietors had each previously permitted the recording of the selections involved; therefore, under the so-called compulsory licensing provisions of the copyright

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law, 17 U. S. C. § 1(e) and 101(e), which deal specifically

[1] The selections and publisher-proprietors were as follows:

Name of Publisher	*Title of Composition*
Shapiro, Bernstein & Co., Inc.	"In the Mood"
Gershwin Publishing Corporation	"Summertime"
Edward B. Marks Music Corporation	"Poinciana"
Miller Music Corporation	"Great Day"
Lewis Music Publishing Company, Inc.	"Tuxedo Junction"
Mutual Music Society, Inc.	"American Patrol"
Mutual Music Society, Inc.	"Song of the Volga Boatman"
Mutual Music Society, Inc.	"Anvil Chorus"
Mutual Music Society, Inc.	"A String of Pearls"

with mechanical reproduction of musical compositions, Krug was entitled to manufacture recordings of these selections provided he filed notice of his intention to do so, and provided he paid the copyright proprietors a royalty of 2 cents for each record manufactured. Krug, however, neither filed the requisite notice nor paid the statutory royalties, and he thereupon became an infringer and subject to statutory damages.[12]

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[12] The two mechanical reproduction sub-sections of the copyright law provide:

§ 1. *Exclusive rights as to copyrighted works.*

* * *

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided*, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to

[2] *continued.*

reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

§ 101. *Infringement*

* * *

(e) *Royalties for use of mechanical reproduction of musical works.* Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section 1, subsection (e), of this title: *Provided also,* That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do, the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section 1, subsection (e), of this title, by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

These two sections have remained unchanged since the Copyright Act of 1909, although initially Section 101(e) was called Section 25(e).

Among Krug's record dealer customers were the Portem Distributing, Inc., and Sam Goody the latter reputed to be one of the largest record dealers in the world. Both Mr. Robert E. Pare, president of Portem Distributing, Inc., and Mr. Goody had been acquainted with Mr. Krug in his capacity as a record salesman for the Colony Record & Radio Center, but both assert that they found nothing surprising or suspicious when it appeared that he was also in the business of manufacturing records under his own label. They made no effort to ascertain whether he had fulfilled his obligations under the copyright law, nor, seemingly, did they make inquiry as to Krug's authority to use Glenn Miller's picture, and to re-record his performance.[3] Both assert that because of the large number of record manufacturers in the field, ranging from large-scale producers to small operations similar in size to Krug's, and because of the compulsory licensing provisions of the copyright law, they cannot and do not attempt to ascertain whether every manufacturer with which they deal has taken the proper steps required under that law.

In May of 1954, Helen D. Miller, who is Glenn Miller's widow and executrix of his estate, joined with the six publishing companies who between them own the nine musical copyrights which had been infringed, and together they brought suit against Krug individually and doing business as A. F. N. Record Company, and against Sam Goody, Portem Distributing, Inc., and several other record dealers who had allegedly bought infringing records from Krug and resold them to the public. Helen D. Miller's complaint was based on unfair trade practices and unfair competition as she alleged that she had the exclusive right

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[3] It is still uncertain whether Krug was required to get authority from the Miller estate, and this phase of the case is yet to be tried. The uncertainties surrounding the law in this area of "dubbing" recordings will be discussed in note [5] *infra*.

to control the recording of Glenn Miller's performances, that she and her husband before her had negotiated exclusive contracts with RCA Victor which fact was well known in the industry, that Krug's records were of inferior quality, and that he and the defendant dealers, therefore, had damaged the value of Glenn Miller's name and reputation by selling these technically inferior recordings, and had also interfered with and damaged her property rights in the name, likeness and music of Glenn Miller, which rights have earned her substantial royalties from RCA Victor and other companies which have paid to use the name and likeness of Glenn Miller in the motion picture, radio and sheet music industries. The complaint of the publishers was based on Krug's violation of the copyright law and on the resale by the dealer defendants of those infringing records, which sale, the publishers assert, was also a violation of the copyright law subjecting the dealers to liability for statutory damages.

The plaintiffs proceeded first against Krug, and on October 5, 1954, the publisher plaintiffs made a motion for a default judgment against Krug who had failed to answer their complaint or take any other steps with respect to it. The default was granted, and by its terms, Krug was enjoined from infringing the musical copyrights involved; a Special Master was appointed to take testimony and compute the amount of damages and royalties owing; and Krug was ordered to turn over to the Special Master all the materials with which he had made the infringing records, provided that upon satisfactory proof to the Court that Krug had filed the requisite notice and paid the royalties found due, the injunction and impounding order would be lifted. *Miller* v. *Goody*, 125 F. Supp. 348 (S. D. N. Y. 1954). Computation proceedings were started, and Krug was called as a witness before the Special Master; before the royalties owing could be ascertained, however, the publisher plaintiffs and Helen D. Miller entered into a stipulation of settlement with Krug.

Under its terms, the injunction against making the offending records was made permanent; Krug turned over to the plaintiffs all the materials with which he had manufactured, labeled and jacketed the recordings; and he paid the plaintiffs other than Helen D. Miller $2,000. "on account of the costs and expenses incurred . . . in their proceedings" against him. All the plaintiffs, while discharging Krug and his heirs, executors and administrators from any further liability arising from this cause of action, expressly reserved all their rights against the other defendants in the case.

By the present motion, the plaintiff publishers are pressing their cause of action separately from that of Helen D. Miller. They seek summary judgment against Sam Goody and Portem Distributing, Inc., two of the defendant dealers. Although the publishers' cause of action has its roots in Sections 1(e) and 101(e) of the copyright law, which sections deal with the mechanical reproduction of music, they seek to recover damages provided for in Section 101(b) of the Act. This latter section, which deals with copyright infringement generally, provides for a minimum recovery of $250. per infringement (with certain enumerated exceptions) where infringement is found but the number of infringing copies sold or published is uncertain. The publishers assert that the dealer defendants infringed their copyrights when they sold the A. F. N. records. The publishers urge that since each defendant admits the sale of some of these records (though the number sold is in dispute), and since under the copyright law intention to infringe is immaterial, they are entitled to a recovery of $250. per copyright from each defendant.

The two dealer defendants herein admit in their brief that "the sale or vending of an unauthorized copy of a copyrighted article by anyone is an infringement of the copyright irrespective of the position of the vendor in the distributive process, his bona fides, his innocence, or the unknown peril to which he may have been subjected."

And this is undoubtedly the law. *F. W. Woolworth Co.* v. *Contemporary Arts,* 344 U. S. 228 (1952); *DeAcosta* v. *Brown,* 146 F. 2d 408 (C. C. A. 2, 1944). Defendants agree, therefore, that the question of their asserted innocence of civil intent is immaterial, and that the case is a proper one for determination by summary judgment since no facts are in issue nor is there need for adjudicating credibility of witnesses. They contend, however, that upon the law the judgment must be in their favor because a record is not a copy of a musical composition within the meaning of the copyright law, and the sale of that which is not an infringing copy is not a violation of the copyright law under Section 101(b) or any other section. They urge that Congress specifically refused to label a recording as a copy and thereby give the musical copyright proprietor complete protection from mechanical reproduction of his music; instead, Congress made specific limited provisions to ensure that record manufacturers pay some price for the use of a composer's work. The dealers contend that those limited provisions, Sections 1(e) and 101(e) are the only rights given to the copyright proprietor when dealing with mechanical reproductions, and they provide for recovery solely against the manufacturer, and then only in certain specified amounts dependent on the number of records manufactured, there being no minimum penalty provision as there is for unauthorized copying. In sum, the defendants argue that under the law the non-manufacturing seller, no matter what the state of his knowledge, is not accountable to the proprietor or to anyone for his sale of infringing records.

A painstaking analysis of the legislative history of the Copyright Act of 1901 and the contemporary comment about it, and a thorough study of the history of the recording industry since that act went into effect, have led me to conclude regretfully that the defendants' contentions must be sustained. In reaching this conclusion, I must confess that I have not been moved by defendants' pro-

testations of innocent intent, which I question: Krug's lack of business address business stationery or even a telephone listing, and his sale of Glenn Miller recordings under an unknown label and in jackets which stated that the records had been taken from radio broadcasts without any showing of approval from the Miller estate, were clear indications that he was a record pirate.[4] While the question of whether a performer like Mr. Miller is protected from such re-recordings has not yet been definitively settled,[5] and is indeed the subject of another phase of this

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[4] Record pirates or "diskleggers" as they have been called, are manufacturers who re-record or "dub" recordings made by legitimate companies and sell them competitively. In this manner, they avoid having to pay the performers for their time, and they have the benefit of the initial recording company's talents in getting the finest rendition possible. Ordinarily, they also omit payment of the copyright, although, as far as the copyright law is concerned, even a pirate has the right to record copyrighted musical compositions provided he files notice of intent and pays the royalties.

[5] Compare *Waring* v. *WDAS Broadcasting Station*, 327 Pa. 433, 194 A. 631 (1937); *RCA Manufacturing Co.* v. *Whiteman*, 114 F. 2d 86 (C. C. A. 2) *cert. denied*, 311 U. S. 712 (1940); *Capitol Records* v. *Mercury Records Corp.*, 221 F. 2d 657 (C. A. 2, 1955) Hand, J. dissenting. The question of the rights of performers in their recorded performances, and of recording companies in their talent in making initial recordings, as against record pirates and others who broadcast the original recordings, has been the subject of numerous legal articles. See *e. g.* Chafee, *Reflections on the Law of Copyright*, 45 Col. L. Rev. 719, 733 et. seq. (1945); Comment, *Protection of the Performing Artist's "Interpretative Rendition" Through the Arranger's Copyright*, 37 Ill. L. Rev. 245 (1942-43); Note, *Rights of Performers and Recorders Against Unlicensed Record Broadcasts*, 49 Yale L. J. 559 (1939-40). The question of whether there is any common law protection for these artists and recording companies either via common law copyright or unfair competition has been considered by few courts so far and different conclusions have been reached. The weight of legal comment seems to be that solution will have to be sought by amendment of the copyright law which, at present, does not permit the copyrighting of a recording. These articles point out that this problem has been before Congress many times but because of the many conflicting interests involved, a satisfactory solution has not been reached and the copyright law has remained unchanged.

lawsuit, it is fairly well known in the trade that most record pirates usually do not pay the necessary royalty fee, particularly when they are operating on a small scale as was Mr. Krug. Note, *Piracy on Records,* 5 Stanford L. Rev. 433 (1952-53). It appears, however, that the law is such that regardless of defendants' awareness of Mr. Krug's probable infringement of any copyrighted selections on the recordings, their acceptance and resale of these records did not violate the copyright laws.[6]

Under the copyright laws existing prior to 1909, "the author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition [had] the sole liberty of printing, reprinting, publishing, completing, copying, executing and vending the same." *White Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1, 9 (1907). This is similar to the protection accorded a copyright proprietor today under 17 U. S. C. 1(a); yet, in the *Apollo* case, *supra*, the Supreme Court held that this list of rights did not protect the copyright proprietor from one who mechanically reproduced the sound of a musical composition on a piano roll or similar mechanical device [e. g. recordings]. While agreeing that the purpose of the copyright laws was to protect intellectual conceptions, the Court maintained that it was the tangible result of the conception which alone was protected from copying, and the tangible result of the composer's art was the sheet music by which one versed in the art could read his score. The

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[6] A corallary to this conclusion, to be discussed *infra*, is that the defendants did not violate any common law rights of the copyright proprietors either, because as will be pointed out, the proprietors are in an area wholly governed by statute and cannot make even the tenuous claims to common law protection in the absence of statute which are being made by recording companies and performing artists in their fight against pirates.

This conclusion makes unnecessary any consideration of other contentions raised by the defendants to the effect that the settlement with Krug released the dealers from liability.

Court defined a copy of a musical composition as "a written or printed record of it in intelligible notation." The appeal of a copy must be to the eye, not the ear. It said, "It may be true that in a broad sense, a mechanical instrument which reproduces a tune copies it; but this is a strained and artificial meaning." *Id.* at 17. The Court found its conclusion regrettable in that record and piano roll manufacturers were thus getting a profitable use of musical compositions without paying value therefor, but it stated that this was a consideration properly addressed to the legislature and not to the courts.[7]

In the Copyright Act of 1909, Congress undertook to remedy this inequity and to grant some measure of protection to musical copyright proprietors against those who were profiting by making recordings of their compositions which were incapable of being read but which served as parts of mechanisms which reproduced such compositions in sound. Congress did not, however, include mechanical reproduction of music in its definition of a copy, although to have done so would have been an easy solution, granting the musical proprietor complete copyright protection against mechanical reproduction. The reasons for not defining a recording as a copy were spelled out in the House Report accompanying the proposed bill.[8] Congress feared the creation of a giant music monopoly in which the big publishing houses, which owned most musical copyrights, would negotiate with the great recording companies for exclusive recording contracts—and such negotiations had actually been started in anticipation of a more favor-

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[7] It must be noted that the Court addressed itself wholly to the question of statutory interpretation, and the question of whether Congress could constitutionally provide that a recording was a copy was not before it.

[8] House Report #2222 on H. R. 28192, 60th Cong. 2d Session. Senate Report 1108 dealing with the same bill merely states that it adopts H. R. #2222 in toto.

able Supreme Court decision in the *Apollo* case. To avoid a music trust injurious to public and composer alike, and to still protect the composer in his work was the problem Congress faced. Its solution was to provide that the musical copyright proprietor could forbid all mechanical reproduction of his music, but once he licensed one company to record it, then all other manufacturers could so record provided they filed a notice of intent and paid a royalty of 2 cents per record. Manufacture in violation of these provisions was made enjoinable, and damages up to three times the amount of royalties due were to be awarded in cases of infringement. The report flatly stated, "It is not the committee's intention to extend the right of copyright to the mechanical reproductions themselves, but only to give control over the manufacture and use of such devices." Although the bill had been unanimously endorsed by the committees of both Houses of Congress, it did not pass unchallenged. Debate on the House floor, as in the committee, was centered on the "canned music" provisions. Detractors argued that putting a flat price on the copyright proprietor's property, *i. e.*, 2 cents a record was an unconstitutional infringement of property rights, but the bill's defenders pointed out that copyright rights are strictly statutory, that prior to this bill the composer had no rights against mechanical reproduction, and Congress in giving him a right could limit or condition it. Further, they pointed out, the constitution speaks of promoting progress in science and the arts as the purpose of copyright protection, and a grant of right which could lead to a music monopoly would be a deterrent to such progress. Again and again, during debate references were made to the manufacturer's rights and duties, and it was clear that the committee considered that the 2 cents plus treble damages was all the relief it was providing, and that this was to be payable by the manufacturer. Cong. Record, March 31, 1909, pp. 3765-3767, 3768-

3770. The bill, as recommended and understood by the committee, was enacted into law and its provisions still govern today.

Legal commentators have criticized this law because of the limited protection given to musical copyright proprietors. In Shafter, *Musical Copyright*, pages 236-244 (1932), the royalty provisions are discussed solely in terms of the manufacturer, and Shafter points out that one disadvantage of the present law is the lack of an award for minimum infringement. In other instances of copyright law, he says, intentions and result are immaterial; if the infringement takes place, there is a minimum award—but this is not so in mechanical reproduction cases. He adds that fly-by-night manufacturers who falsify their books as to the number of records manufactured are a serious problem in the industry. Similar critical comment is made in Weil, *American Copyright Law*, pages 63, 96-97, 489 (1917) which criticizes the fact that the proprietor is without apparent remedy against an insolvent manufacturer, except, of course, for injunction. No mention is made of a possible alternative recovery from a seller. Congressional unfriendliness towards extending the copyright of musical compositions to mechanical reproductions, and the failure of efforts to persuade Congress to provide less meagre relief were recently noted by the Court of Appeals for the Second Circuit in *E. B. Marks Music Corp.* v. *Foullon*, 171 F. 2d 905 (1949). The fact that mechanical reproduction is considered a separate area not under the general scope of the copyright law is also illustrated by the fact that the basic copyright texts deal with mechanical reproduction of music as a separate topic, and do not include it with their general discussion of copyright infringement. See *e.g.* Shafter, *Musical Copyright* (1932); Weil, *Copyright Law* (1917); Bowker, *Copyright, Its History and its Law* (1912); Amdur, *Copyright Law and Practice* (1936).

Similarly, comment has often been made to the effect that a recording is not a copy within the meaning of the copyright law, and that distribution of such records is not publication. See *Capitol Records Co.* v. *Mercury Records Corp.*, 221 F. 2d 657, 659-662, 664-665 (C. A. 2, 1955); Nimmer, *Copyright Publication*, 56 Col. Law Rev. 185, 188 n. 34 (1956). The problem of mechanical reproduction of musical compositions is not specifically covered in the Universal Copyright Convention adopted in Geneva in 1952 by the Intergovernmental Copyright Conference sponsored by UNESCO. However, Article VI of that Convention defines publication as "the reproduction in tangible form of copies of a work from which it can be read or otherwise visually perceived". In Dubin, *Copyright Aspects of Sound Recordings*, 26 So. Calif. L. Rev. 139-156 (1953), it is pointed out that putting "aural" perception into this definition of a copy would have caused confusion in the United States where records are not deemed to be publications.[9]

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[9] This American view that recordings are not publications stems from the limited scope of the copyright law of 1909 and its rationale that records are not copies. This has caused confusion in another area of the musical industry; since a recording is not a copy of a musical selection, it cannot be filed under the copyright law which requires that a copy of the composition to be protected must be filed. With the current popularity of records as opposed to sheet music, a practice has arisen of releasing musical selections in recorded form before publishing the sheet music. The question arises, is such a recorded release a publication within the meaning of the copyright law which would deprive the composer of a right to later file a "copy" of his song and receive statutory protection. (Publication ends common law rights, and filing under the statute must be simultaneous with such publication, or there is a dedication to the public and all copyright protection is lost.) See Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. of Pa. L. Rev. 469 (1954-55); Chafee, *Reflections on the Law of Copyright, supra*. This question would not have arisen were a recording considered a copy within the meaning of the copyright law.

Despite this background of comment adverse to the claims made herein by the publisher plaintiffs, and despite the fact that except for one lawsuit brought in 1952 [to be discussed *infra*], the musical industry has operated under the assumption that the $250 minimum penalty does not apply to mechanical reproduction, and that the sole remedies for such recording are against the manufacturer as set forth in Section 1(e) and 101(e), the publishers urge here that the copyright law can be and should be construed in favor of their contentions. They base their argument on the language in Section 101(e) which speaks of "infringement of such copyright by the unauthorized *manufacture, use or sale*" of recordings and other mechanical sound reproducing devices. (Italics supplied). This subsection then states that the plaintiff is entitled to recover for such infringement and it does not specifically limit that right to recovery from the manufacturer. The publishers contend that there is a distinction between recordings made by a manufacturer who files notice of compulsory license but then fails to pay the royalties, and recordings made by a manufacturer who does not even file notice. The former they agree are covered exclusively by the royalty-treble royalty provisions. They urge, however, that the latter are records whose manufacture is unauthorized within the meaning of Section 101(e) and whose use or sale is an infringement of the Act. They contend that Section 101 (e) with its limited treble damage provisions is the sole provision applicable only in situations where there has been a compulsory license agreement. Where there is no such arrangement, as was the case here, then there is regular copyright infringement and the other infringement sections, notably the minimum damage section [101 (b)] are applicable. Since Krug did not even file the requisite notice, it is urged that his recordings fall into

this latter category. The plaintiffs argue that if Section 101(e) is construed as applying only to the initial manufacture of such records, and as providing recovery only against such an unauthorized manufacturer, then the phrase "manufacture, use or sale" becomes meaningless, and this, they say, would be improper construction.

Although their argument has surface merit, particularly the contention that an adverse ruling will deprive the phrase "manufacture, use or sale" of any meaning, I find that plaintiffs' position cannot be sustained; for to uphold them here would be to discard the entire statutory royalty and treble royalty scheme so painstakingly worked out by Congress in its attempt to resolve conflicting interests. Further, such a ruling would create practical enforcement difficulties incapable of being handled by judicial decision.

Dealing with this latter problem first, it has been held that a manufacturer, may at any time, change his status from infringer to compulsory licensee by filing the requisite notice and paying the royalties due. In *G. Ricordi & Co., Inc.* v. *Columbia Graphophone Co.*, 263 Fed. 354 (C. C. A. 2, 1920) this change in status was permitted between judgment and appeal in a suit involving illegal manufacture, and that case is still the controlling law. In this very action, Judge Dawson recognized the *Ricordi* principle when he ruled that the injunction against Krug would be lifted and his recording materials returned to him whenever he filed the requisite notice and paid the royalties due. *Miller* v. *Goody, supra.* Had there been no consent decree, and had Krug subsequently become a compulsory licensee, the records sold by defendants herein would have lost their status as infringing records. Indeed, by the terms of plaintiffs' own argument, had Krug filed notice and not paid the royalties, the records would still have lost infringing status at least to the extent that

the only protection against them would then be that accorded under the mechanical reproduction sections and limited to recovery from the manufacturer. It is difficult to believe that Congress intended to hinge such huge differences in consequence on a paper distinction; moreover, Congress could hardly have intended to create a seller's liability totally dependent on the manufacturer's surface intent. It would be illogical to rule that a seller may at any time be sued as an infringer when he has no control over the status of the records involved. The copyright law must be read to have general application, and if it had been intended ever to apply to a non-manufacturing seller it would provide, as a matter of good drafting, for a set point in time when the seller does become liable, and set conditions for suit would be prescribed which would not rest wholly upon the actions of others. Clearly, the type of liability formula necessary is one which would have to be devised by the legislature, not imposed on an ad hoc basis by the judiciary, and to impose liability against sellers generally without some such formula would be contrary to Congress' clear purpose to impose primary [if not sole] liability upon the manufacturer of infringing records.

Even more basic to the argument against plaintiffs' interpretation is that their construction makes the whole royalty-treble royalty, limited recovery scheme meaningless. According to plaintiffs' construction, the proprietor may recover royalties and damages from the infringing manufacturer, and then minimum damages or actual damages from any distributors of the infringing records, no matter how innocent their intent. This is basically the protection accorded against copying under the copyright law; had this been intended, Congress would merely have called a recording a copy and simplified its problem, or it would have provided for compulsory licensing and then

said that recording without a license would be penalized as is ordinary infringement. The additional punitive clauses in Sections 1(e) and 101(e) would have been unnecessary. This line of reasoning finds further support in the fact that the words "manufacture, use or sale" appear in the same phrase; therefore, if the infringing seller is liable under Section 101(b), so also is the infringing manufacturer, and the penalty provisions of Section 101(e) either become meaningless or give to the musical copyright proprietor a greater choice in his type of recovery than is given to any other copyright holder. Such a conclusion would be wholly inconsistent with the legislative purpose of giving only limited rights against mechanical reproduction of music.

The basic unsoundness of plaintiffs' position is also demonstrated by the fact that for over forty years the musical industry operated on the assumption that the $250 minimum penalty clause was not applicable to mechanical reproduction of music. Perhaps a brief statement of the historical background of the industry may explain why the instant contention is now being pressed with such tenacity. The plaintiffs' present position is being pursued as part of a general campaign on the part of copyright proprietors, legitimate recording companies, and musicians' and performers' organizations to drive record pirates out of business. This drive received impetus, when with the advent of long-play records, the record pirates, who had hitherto confined their operations largely to old records not recently re-released by the major companies, began to dub recordings of current hits and to invade the entire record market on a large scale. In January of 1952, as part of that campaign, Columbia Record Company and Louis Armstrong joined in a suit against one of the major record pirates, Paradox Industries, Inc., and its president, Dante Bollentino. This company, which sold its records under the "Jully Roger" label, had dubbed

many recent recordings made by Armstrong for Columbia. The Columbia suit was based on unfair competition and on invasion of Armstrong's right of privacy. The litigation ended in a consent decree which enjoined the defendants from dubbing plaintiffs' records and ordered that records and masters of plaintiffs' items be delivered up for destruction. The defendants were also enjoined from using Armstrong's name and picture without permission, and Armstrong received $1,000. in damages.

Although the settlement seemingly produced a favorable reaction in that the record pirates started to run for cover, the music industry was not quite satisfied with the decree. See Note, *Piracy on Records, supra.* Part of their dissatisfaction might well have stemmed from the fact that the settlement decree still created no precedent in a legally foggy area, and it was thought by many that the strongest pressure could be brought to bear against the pirates via the copyright act. Accordingly, four music publishing houses brought suit against Paradox and Bollentino alleging infringement of various musical copyrights held by them in that the defendants had recorded the selections without filing notice or paying the copyright fees. The defendants were already out of operations as a result of the Columbia consent decree, and they both defaulted; their attorney wrote to plaintiffs' attorneys that any victory would be pyrrhic. The plaintiffs had sued under the theory pressed here, *i.e.* that they were entitled to $250 per infringement.[10] Their brief

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[10] They sued for this minimum amount not only because of the difficulty of proving the number of illegal records made, but because one of the reasons the pirates often did not bother to qualify under the copyright act was their belief that the minimum penalty clause was not applicable to mechanical reproductions. Since the usual number of pressings of each bootlegged record was 750 to 1,000, this meant that at the statutory 2 cent royalty rate the proprietors

(*Footnote continued on following page*)

in that case, which I have examined, nowhere indicated that there might be a difficult statutory interpretation problem as to whether the minimum penalty clause was applicable to recordings, and, there being no answering brief or argument, the default decree was entered as requested.[11] This default decree represented the sole occasion that the $250 minimum penalty had been applied to mechanical reproduction cases, and under the circumstances leading to its rendition, it cannot be considered

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(*Footnote continued from preceding page*)

would receive $15. or $20. recovery per infringement, and the treble damage provisions would not even bring the rate up to $100. per infringement. *Piracy on Records, supra.* Even though the copyright act provides for recovery of costs and reasonable counsel fees in cases arising under the mechanical reproduction provisions, there are other expenses in time and effort beyond the allowable counsel fees which made it impracticable for copyright proprietors to bring suit for such a small sum, so the pirates scoffed at the law with impunity.

[11] Actually four companion cases were brought by the different publishing companies involved, although only one brief was submitted for all. Default was entered in *Robbins Music Corp.* v. *Paradox Industries, Inc.* and *Dante Boilentino*, Civ. 75-18, *Leo Feist, Inc.* v. *Same*, Civ. 75-15, *Mills Music, Inc.* v. *Same*, Civ. 75-16, *Shapiro, Bernstein & Co., Inc.* v. *Same*, Civ. 75-17. All decrees were entered in the Southern District of New York, June 5, 1952, per E. A. Conger, D. J. The attorneys who represented the publishers in that litigation are acting in the same capacity in the present case. Their brief then, as here cited, many cases which have held that every copyright infringement entitles the proprietor to the $250. minimum penalty, that innocence of the infringer is no excuse, and that the copyright certificate is prima facie evidence that the selection involved is protected by that law. These cases are irrelevant though to the question of whether manufacture or sale of recordings of musical selections is to be considered infringement under the general terms of the statute or is to be treated as a separate problem. Although plaintiffs' attorneys ably argued and briefed that question in the present case, they were unable to present a single case or legal commentary favorable to their contention other than the four companion cases, *supra*, where default was entered, and this problem was never raised.

as authority for plaintiffs' contentions as these contentions were never aired or contested. It must be emphasized that in the instant case, plaintiffs seek to extend this penalty to non-manufacturing sellers, a group on which Congress did not impose any duties under the mechanical reproduction provisions.

I have reached my decision in this matter with reluctance, but the conclusion is one from which I cannot escape. The inequities and inadequacies of the present law cry out for correction. It is scant comfort to the publisher plaintiffs herein to be told that although their plight is distressing, there are others in the industry, notably recording companies and talented performers, who at present receive even less protection from record pirates and those who distribute their wares. It is equally harsh to tell them that their remedy lies in the legislatures when the problems of the recording industry have been before various legislative bodies over the years, and the conflicting interests involved have prevented any solution. But I cannot innovate at pleasure in the name of justice nor is it proper for me to roam at will in the face of legislative restraint in pursuit of what I consider to be the ideal. Where the legislative mandate is clear, as is the case here, judges are bound to follow the law scrupulously regardless of personal preference, and the rule of strict adherence to the statute is never so necessary as where the legislature has established what it considered to be a comprehensive regulatory scheme as it did in the case of mechanical reproduction of music. For a judge to attempt to qualify or amplify the rights Congress delineated in such detail would be both imprudent and improper. In this regard, the words of Judge Learned Hand in *RCA Manufacturing Co.* v. *Whiteman*, 114 F. 2d 86, 90 (C. C. A. 2) cert. denied, 311 U. S. 712 (1940), bear repetition.

"We are adjured that courts must adjust themselves to new conditions, and that in the case at bar justice clearly points the way to some relief. We cannot agree; no doubt we should be jealous to execute all reasonable implications of established doctrines; but we should be equally jealous not to undertake the composition of substantial conflicts of interests, between which neither the common law, nor the statute, has given any clue to its preference. We cannot know how Congress would solve this issue; we can guess—and our guess is that it would refuse relief as we are refusing it—but if our guess were the opposite, we should have no right to enforce it."

In the present case, the best that can be said for plaintiffs' position is that Congress has not considered this problem and the worst, that Congress has considered this problem and has decided against the plaintiffs' position. Under either interpretation of legislative history, the hands of the judiciary are tied. The plaintiffs' motion for summary judgment in the sum of $250 per infringement from each defendant must, therefore, be denied.

Defendants have cross-moved for summary judgment in their favor against the publisher plaintiffs dismissing their complaint. Since the publishers allege unfair trade practices and unfair competition as well as copyright infringement, it must be determined whether they may maintain such a cause of action here. The musical selections involved have been published; such publication was a dedication to the public and put an end to common law copyright protection. In the absence of the copyright law, therefore, all persons would be free to copy the compositions in question. This being so, in the absence of statute, it would not be unfair competition either to copy the compositions or to reproduce them in sound; any other

conclusion would deprive the theory of dedication to the public of any meaning. Thus the copyright law becomes the sole measure of protection available to a composer of a published work, and this protection depends on the terms of the statute itself. See Nimmer, *Copyright Publication, supra.* That this rationale gives a record manufacturer the opportunity to profit from a composer's skill without paying therefor was pointed out clearly by Justice Holmes concurring in the *Apollo* case, *supra,* but the fact that the manufacturer is getting something for nothing does not make his actions illegal. And the same holds true with the distributor of his products. I find, therefore, that the copyright proprietors have no common law rights against the defendants which can be asserted here.[12]

Under these circumstances, the motion of the defendants must be granted, and the publisher plaintiffs' complaint must be dismissed. So ordered.

Dated: New York, N. Y.
March 16, 1956.

IRVING R. KAUFMAN,
U. S. D. J.

Judgment entered:

WILLIAM J. CONNELL,
Clerk.

3/16/56.

---

[12] As pointed out in Note [6] *infra,* there is a distinction between the possible common law rights of performers and recording companies as to whom Congress has not legislated, and the rights of those who hold the copyrights on published musical compositions. So long as the publishers base their claims on injury to the copyrights they hold, their remedy must be sought under the statute.

Notice of Appeal.

(Record pages 617 to 618)

NOTICE IS HEREBY GIVEN that Shapiro, Bernstein & Co., Inc., Gershwin Publishing Corporation, Edward B. Marks Music Corporation, Miller Music Corporation, Lewis Music Publishing Company, Inc. and Mutual Music Society, Inc., plaintiffs above named, each hereby appeals to the United States Court of Appeals for the Second Circuit, from the final judgment entered in this action on March 16, 1956.

Dated, New York, N. Y., March 20, 1956.

Stipulation of Omissions.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the plaintiffs, Shapiro, Bernstein & Co. Inc., Gershwin Publishing Corporation, Edward B. Marks Music Corporation, Miller Music Corporation, Lewis Music Publishing Company, Inc. and Mutual Music Society, Inc. and the defendants Sam Goody and Portem Distributing Inc., that the record on appeal in the above entitled action shall constitute the following original papers, all other original papers to be omitted therefrom, viz:

1. Complaint and exhibits.

2. Answer of defendant Sam Goody.

3. Answer of defendant Portem Distributing, Inc.

4. Motion papers upon application of plaintiffs, other than Helen D. Miller, Individually etc., for default judgment against defendant Joseph Krug.

Stipulation of Omissions.

5. Opinion Dawson, J., dated November 3, 1954, upon application for default judgment against defendant Joseph Krug.

6. Order for default judgment against defendant Joseph Krug, dated November 23, 1954.

7. Motion papers upon application of plaintiffs, other than Helen D. Miller Individually, etc., to punish defendant Joseph Krug for contempt of court.

8. Order of L. R. Kaufman, J., dated March 27, 1955, withdrawing motion to punish defendant Joseph Krug for contempt of court, etc., and two stipulations dated respectively March 21, 1955 upon which said order was based.

9. Report of Special Master Charles L. Sylvester, dated March 24, 1955.

10. Transcript of proceedings before Special Master on December 10, 1954, January 4, 1955, February 23, 1955 and February 28, 1955.

11. Motion papers upon application of plaintiff Shapiro, Bernstein & Co., Inc. for summary judgment against defendants Sam Goody and Portem Distributing, Inc., and exhibits.

12. Motion papers upon application of plaintiff Gershwin Publishing Corporation for summary judgment against defendants Sam Goody and Portem Distributing, Inc., and exhibits.

13. Motion papers upon application of plaintiff Edward B. Marks Music Corporation for summary judgment

against defendants Sam Goody and Portem Distributing, Inc., and exhibits.

14. Motion papers upon application of plaintiff Miller Music Corporation for summary judgment against defendants Sam Goody and Portem Distributing, Inc., and exhibits.

15. Motion papers upon application of plaintiff Lewis Music Publishing Company, Inc. for summary judgment against defendants Sam Goody and Portem Distributing, Inc., and exhibits.

16. Motion papers upon application of plaintiff Mutual Music Society, Inc. for summary judgment against defendants Sam Goody and Portem Distributing, Inc., and exhibits.

17. Motion papers upon cross application of defendant Sam Goody for summary judgment against plaintiff Shapiro, Bernstein & Co., Inc.

18. Motion papers upon cross application of defendant Sam Goody for summary judgment against plaintiff Gershwin Publishing Corporation.

19. Motion papers upon cross application of defendant Sam Goody for summary judgment against plaintiff Edward B. Marks Music Corporation.

20. Motion papers upon cross application of defendant Sam Goody for summary judgment against plaintiff Miller Music Corporation.

21. Motion papers upon cross application of defendant Sam Goody for summary judgment against plaintiff Lewis Music Publishing Company, Inc.

Stipulation of Omissions.

22. Motion papers upon cross application of defendant Sam Goody for summary judgment against plaintiff Mutual Music Society, Inc.

23. Motion papers upon cross application of defendant Portem Distributing, Inc. for summary judgment against plaintiff Shapiro, Bernstein & Co., Inc.

24. Motion papers upon cross application of defendant Portem Distributing, Inc. for summary judgment against plaintiff Gershwin Publishing Corporation.

25. Motion papers upon cross application of defendant Portem Distributing, Inc. for summary judgment against Edward B. Marks Music Corporation.

26. Motion papers upon cross application of defendant Portem Distributing, Inc. for summary judgment against plaintiff Miller Music Corporation.

27. Motion papers upon cross application of defendant Portem Distributing, Inc. for summary judgment against plaintiff Lewis Music Publishing Company, Inc.

28. Motion papers upon cross application of defendant Portem Distributing, Inc. for summary judgment against plaintiff Mutual Music Society, Inc.

29. Reply affidavit of Julian T. Abeles, verified February 13, 1956.

30. Opinion, I. R. Kaufman, J., dated March 14, 1956, upon respective applications of plaintiffs other than Helen D. Miller Individually etc. and of defendants Sam Goody and Portem Distributing, Inc., for summary judgment.

Stipulation of Omissions.

31. Notice of Appeal of plaintiffs, other than Helen D. Miller Individually etc., dated March 20, 1956.

32. This stipulation.

IT IS HEREBY FURTHER STIPULATED AND AGREED by and between the attorneys for said parties that "Exhibit A(1)" and "Exhibit A(2)", comprising two phonograph records and the respective jackets in which they are contained, referred to in and made a part of the motion papers upon the application of plaintiffs Shapiro, Bernstein & Co., Inc., for summary judgment against defendants Sam Goody and Portem Distributing, Inc. (Item "11" supra) may be handed up upon the argument of the appeal.

Dated, New York, N. Y.,
May 1, 1956.

ABELES & BERNSTEIN,
Attorneys for plaintiffs
other than Helen D. Miller,
Individually etc.

TELSEY & LOWENTHAL,
Attorneys for defendant
Sam Goody.

RAUCHER & LEFTOFF,
Attorneys for defendant
Portem Distributing, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 677

SAM GOODY,

Petitioner,

against

SHAPIRO, BERNSTEIN & CO., INC., GERSHWIN PUBLISHING CORPORATION, EDWARD B. MARKS MUSIC CORPORATION, MILLER MUSIC CORPORATION, LEWIS MUSIC PUBLISHING COMPANY, INC. and MUTUAL MUSIC SOCIETY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ABRAHAM M. LOWENTHAL
Attorney for Petitioner
55 Liberty Street
New York 5, N. Y.

LEON G. TELSEY
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

SAM GOODY,

Petitioner,

against

SHAPIRO, BERNSTEIN & CO., INC., GERSHWIN PUBLISHING CORPORATION, EDWARD B. MARKS MUSIC CORPORATION, MILLER MUSIC CORPORATION, LEWIS MUSIC PUBLISHING COMPANY, INC. and MUTUAL MUSIC SOCIETY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petition of Sam Goody prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the case entitled "Shapiro, Bernstein & Co., et al., plaintiffs-appellants v. Sam Goody & Portem Distributing Co., defendants-appellees" on September 28, 1957.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, printed in Appendix C hereto, *infra*, pages 20-34, is reported in 248 F. 2d 260 (1957).

The opinion of the United States District Court for the Southern District of New York, printed in Appendix C hereto, *infra*, pages 35-58, is reported in 139 F. Supp. 176 (1956).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was made and entered on September 28, 1957 (Appendix A hereto, *infra*, p. 14).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether under the compulsory license provisions, so-called, of the Copyright Act, a retailer of phonograph records, not himself the manufacturer, is liable for royalties or damages to the owner of the copyright of the recorded musical work when the manufacturer, having no license by agreement, neither files notice of intended use nor pays statutory royalties to the copyright owner.[1]

Statute Involved

The statutory provisions involved are Sections 1(e), 101(b) and 101(e) of the Copyright Act of 1909 [17 U.S.C., §§1(e), 101(b), 101(e); 35 Stat. 1075 *et seq.*]. They are printed in Appendix B hereto, *infra*, pages 15-19.

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[1] A subsidiary question, which petitioner intends to argue if certiorari be granted, is whether a release by the copyright owner to the manufacturer, purporting to reserve rights against all other persons, frees the records previously sold from further contribution to copyright.

Statement of the Case

The respondents, plaintiffs below, are owners of copyrights of nine musical compositions. All have authorized the recording on phonograph records of the selections covered by the copyrights.

One Joseph Krug, originally a defendant, manufactured two records on which were reproduced performances of the copyrighted works. He held no license by agreement with the copyright owners. He neither gave the notice of intended use referred to in section 101(e) of the statute, nor did he pay statutory royalties [section 1(e)] to the proprietors of the copyrights. Krug sold the records made by him to distributors and retailers, who in turn sold them to the public.

The petitioner Goody, a defendant below, is a retailer of phonograph records. He bought from Krug 150 sets of the records in question (R. 113),[2] having been told by Krug that the latter had authority to make the records (R. 47). Goody, who maintains a large inventory of records of all manufacturers, does not investigate their compliance with the Copyright Act (R. 113-114). He made no specific inquiry of Krug with reference to the statute, and did not know whether in fact Krug had complied with its provisions relating to mechanical reproduction (R. 113).

The respondents commenced an action under the Copyright Act (Act of March 4, 1909, c. 320, 35 Stat. 1075 *et seq.*, 17 U.S.C.) in the District Court against Krug, Goody and other distributors of records, asserting infringement of copyright and asking for an injunction, destruction of the mechanical parts, damages as for infringement of copyright under the general remedial provisions of the act and other relief. Krug defaulted in answering. The court

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[2] Record references are to the Plaintiffs-Appellants' Appendix below. No other appendix was filed.

granted an injunction against him and allowed to the plaintiffs a royalty of two cents per record and damages of treble that amount, referring the case to a special master for computation of the amounts involved,[3] but it refused to order destruction of the parts used in making records, on the ground that Krug might become entitled to use them, and instead ordered them to be impounded by the master.

Before the computation could be made as directed, the respondents settled their dispute with Krug (R. 130-134). They accepted $2,000 (which they maintain was on account of their expenses only), dismissed their causes of action against him with prejudice and delivered a general release from claims arising from the subject matter of the action, in which release they reserved their rights against all other defendants. Krug authorized the master to deliver up the mechanical parts to the plaintiffs' attorneys. The settlement was then confirmed by the court (R. 128-130).

The petitioner Goody had no notice of any of the proceedings before the master and in relation to the settlement with Krug, and he took no part therein (R. 121).

Each plaintiff copyright owner then moved for summary judgment against the petitioner and another defendant, urging that it was entitled to statutory damages under Section 101(b) of the Act in the sum of $250 for each composition recorded on the records sold, an injunction, and counsel fees. These defendants made cross-motions for summary judgment dismissing the complaint.

The defendants' motions were granted by the District Court on the ground that the scheme of the Copyright Act did not provide for the remedy sought, and that only the Congress may determine the extent of protection to be given to the copyright owner.

The plaintiffs appealed from the judgment dismissing their complaints. The Court of Appeals, although agreeing

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[3] 125 F. Supp. 348 (D.C.N.Y. 1954), *sub. nom. Miller* v. *Goody*.

with the District Court that the extent of protection and balancing of interests is for the Congress, reversed and remanded the cause. It held that section 101(e) of the Copyright Act provided a remedy against a seller of a record in the circumstances before it, but that the recovery was limited to two cents per record. It considered that the money paid by Krug and fairly allocable to costs of the action should be set off against the liability, if any, of the other defendants for costs, and that any payment by Krug fairly allocable to counsel fees should reduce the liability, if any, of the remaining defendants therefor if the District Court should in its discretion award counsel fees.

Reasons for Granting the Writ

1. It is, as the Court of Appeals remarked, "a curious fact that although the Copyright Law has remained without relevant change since 1909 this case should present a question both basic and novel."[4]

The decisive construction of the statute is important to an already large and still growing industry throughout the country. When the present statute was enacted phonograph records were relatively unimportant, player-piano rolls having been the principal means of mechanical reproduction. These are now a negligible part of the market, and even sheet music has lost most of its significance. The development of microgroove records and improvement in techniques of recording and reproducing sound, together with the perfection of tape recordings, have made these mechanical parts into the most important devices for bringing music to the public, apart from actual or "live" performances.[5]

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[4] Appendix C, *infra*, p. 22.

[5] See Henn, The Compulsory License Provisions of the United States Copyright Law (General Revision of the Copyright Law, Study No. 1), Copyright Office, The Library of Congress (1957), p. 55.

Since 1949 the number of record manufacturers has multiplied more than thirty times, so that at the time of the proceedings in the District Court there were more than 365 of them (R. 112). As some drop out others enter the field. No extraordinary skill is required for the manufacture of modern records, and the size or prestige of the issuing company is no index of the quality of the recording or of the public demand for it (R. 112).

The petitioner's sales early in 1956 were at a rate exceeding 1,500,000 records and $4,000,000 in gross amount a year (R. 112). The petitioner is, of course, but a single retail dealer in phonograph records, tapes and other equipment for the reproduction of sound. There are many others, and there are also many wholesale distributors of such articles.

The Congress did not consider the compulsory licensing provisions under the Copyright Act between 1909 and 1925. Since then over twenty bills on the subject were introduced, but none has been enacted.[6] The music industry, including composers, publishers and manufacturers and sellers of devices for recording and reproduction of sound, is now operating under a statute which was adopted when the economic situation was wholly unlike that of today, and which is hardly clear.

It is not improbable that other courts will view the law as differently as did the courts below in this case. Copyright proprietors have already proceeded against retailers of records on the basis of the decision of the Court of Appeals, apparently without also seeking relief under the statute against the manufacturers who gave no notice of intended use. This deliberately chosen course of action by copyright owners has an element of unfairness, and is adaptable to use as a means of driving a selected dealer

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[6] See Henn, *op. cit. supra*, note 5, at pp. 24-44.

out of business.[7] A dealer's economic success or even his economic life may depend upon the location of his place of business, since the Copyright Act may receive varying interpretations. The substantial segment of the business community which is directly concerned with music, and which has thus far conducted itself on the understanding that the law was as the District Court declared it to be, ought to have a definitive guide for the future.

There is also involved in this case the interest of the public in the ready availability of artistic productions, for the promotion of which the protection of copyright is granted to the composer.[8] Interpretations by performing artists differ, and records permit the purchaser to choose. Whether a wide choice will exist hinges upon the meaning of the Copyright Act, for if the court below correctly construed it, dealers will be reluctant to purchase records for resale to the same extent as they have been doing; many manufacturers may be expected to discontinue business, and the manufacture of records may be left to a handful of companies whose compliance may be the subject of ready investigation or willing gamble by the dealer. Not only would the choice of the consumer be restricted, but he may be confronted with monopoly or something very like it, a result which the Congress wished especially to prevent when it adopted the device of compulsory license.

2. The sections of the Copyright Act under which the respondents claim are ambiguous. The phraseology used in the compulsory licensing provisions of section 1(e) differs from that used in the implementing provisions of section 101(e). There are inconsistencies in substance as

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[7] The amount of the royalty itself may be significant when applied to a large number of long-playing records, but the costs and counsel fees present an especially serious potential liability.

[8] The Speaker of The House of Representatives believed the bill which was enacted would affect every household in the country. See 43 Cong. Rec. 3765 (1909).

well as terminology, touching the scope of the limited rights afforded to the proprietor of the copyright.[9] They testify to the emphasis placed by the Congress upon section 1(e) and the manufacturer, and to the comparative neglect of care in the drafting of section 101(e).

The compulsory license to the manufacturer and his liabilities as provided by section 1(e) occupied more time of the House Committee on Patents than any other provision of the bill.[10] But the intent with respect to the scope of section 101(e) is obscure. The House Committee on Patents furnished almost no explanation.[11] The bill was reported out of committee on February 22, 1909. The House passed it on March 3, after discussion confined almost entirely to the license, the royalty to be paid and the liability of the manufacturer for non-payment.[12] The bill passed the Senate that day in an evening session, after even less debate than was had in the House,[13] and became law on March 4, 1909, effective July 1, 1909.

Both the District Court and the Court of Appeals recognized the ambiguities in the statute. Section 1(e) clearly refers to the manufacturer of parts of instruments as the recipient of the Congressional license. Section 101(e), however, relating (among other things) to notice of intended use to be given by the manufacturer, employs the words "unauthorized manufacture, use or sale." Because of their presence the Court of Appeals treated section 101(e) as embracing a situation entirely different from that contemplated by Section 1(e) and as providing a remedy against a non-manufacturing seller. Having gone

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[9] See Henn, *op. cit. supra*, note 5, at pp. 18-20.

[10] H.R. Report No. 2222 on H.R. 28192, 60th Cong. 2d Sess. (1909), p. 4.

[11] H.R. Report No. 2222 on H.R. 28192, 60th Cong. 2d Sess. (1909), p. 16.

[12] 43 Cong. Rec. 3765-3767, 3768-3769 (1909).

[13] 43 Cong. Rec. 3746-3747 (1909).

so far, it found further ambiguity or conflict in the relation of the general remedial provisions of section 101(b) to those of section 101(e), and again in the impact of specific remedial provisions of section 116 on section 101(e) as construed. It saw yet another problem in the amount of permissible recovery under section 101(e), resolving this by resort to that part of section 1(e) which mentions the royalty of two cents per part, excluding any discretionary right to increase the award by an amount equal to treble the royalty.

The difficulties experienced by the courts below and the difference in their views of a concededly loosely drawn statute demonstrates the need for an authoritative interpretation of the law which will be controlling in all circuits.

3. The construction of the Copyright Act by the Court of Appeals is believed to be erroneous.

(a) The immediate stimulus for the enactment of sections 1(e) and 101(e) of the Copyright Act as they exist was the decision of this Court in *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U. S. 1, 28 Sup. Ct. 319 (1908), holding that the manufacture and sale of a player-piano roll of a copyrighted musical composition was not copying, and that consequently no infringement of copyright was thereby committed. This Court believed that a copy involves a written or printed record of a piece of music in an intelligible or readable system of notation, not a part of a device for mechanical reproduction such as a music roll (and inferentially a record). The protection of copyright (as this Court has had occasion to repeat) extends fundamentally to the right of multiplying copies.[14]

The Congress sought to make some provision in the law for devices for mechanical reproduction. It could have

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[14] See, e.g., *Mazer* v. *Stein*, 347 U. S. 201, 218; 74 Sup. Ct. 460, 471 (1954).

changed the rationale of *White-Smith* by definition of a copy or by allowing copyright in the parts of mechanical devices as such. The House Committee on Patents was at first inclined to grant such broad protection, but feared the establishment of a vast monopoly. It was considering the proposed legislation in an atmosphere distinctly unfavorable to the desires of copyright proprietors for complete control of mechanical rights.[15] The Congress therefore changed only the result of the decision of this Court, but not its basis, by granting a limited recognition to rights of reproduction through mechanical means.[16] It balanced the claims of copyright owners for full protection and the public interest in availability of recorded music by a compromise, i.e., the compulsory license provision of section 1(e). It then added section 101(e), dealing with additional remedies of the copyright owner.

In its endeavor to reconcile sections 1(e) and 101(e), the court below has in effect made a phonograph record into a copy of a composition where notice of intended use is not given by the only person who may give it under the statute either before or during suit, albeit with different monetary consequences than those which flow from violation of copyright under the remainder of the law. This it did although the Congress deliberately chose not to change the rationale of *White-Smith*, and in so doing it expanded the scope of the law so as to give the copyright owner something approaching the exclusive right to make, use and vend.

(b) The words "unauthorized manufacture, use or sale" in section 101(e) should not overturn the statutory scheme

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[15] See H.R. Report No. 2222 on H.R. 28192, 60th Cong. 2d Sess. (1909), pp. 5-7, 9.

[16] The Copyright Office will not accept a phonograph record carrying a transcription of a performance for deposit in connection with statutory copyright of the work so recorded. See Letter of the Copyright Office to Fred Waring, partially set forth in *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 438, n. 2; 194 Atl. 631, 633 n. 2 (1937).

whereby only a limited control over mechanical reproduction is given to the copyright owner.[17] If he grants a license by agreement, that, and not the statute, is the measure of his rights and remedies.[18] The authority to record mechanically is granted by the Congress once the copyright owner has used or allowed the use of similar means. Though the license is termed "compulsory", the law compels the copyright owner to do nothing; in itself it embodies the grant of the license. True, the manufacturer may be sued for royalties and other sums, but none of the remedial provisions of sections 1(e) and 101(e) vitiates the license which the statute confers. Section 1(e) gives the manufacturer authority. He needs no other.

(c) The authority or license of section 1(e) is not expressly conditioned upon filing of notice of intended use. That notice is referred to only in section 101(e). It obviously is to be given by the manufacturer of a record, not a retailer. The license nevertheless exists. Not even failure to pay royalties provided by the very section containing the grant destroys the right, although the copyright owner might ordinarily terminate a consensual license on this ground. It is anomolous to hold a retailer as an infringer because the manufacturer, having a statutory license, fails to file notice of intended use and thereby becomes liable, under section 101(e), to the copyright owner for sums in addition to the amount of the royalty or the royalty trebled.

The respondents conceded that if Krug had given notice of intended use but had failed to pay royalties their only remedy would have been by suit against him for such royalties. The result below therefore turns not upon sale

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[17] Since the bill which became law was considered by the Committee on Patents, it is perhaps not unnatural that words of patent law should have been used inadvertently, particularly in the light of the concentration on section 1(e).

[18] *Edward B. Marks Music Corp.* v. *Foullon*, 171 F. 2d 902 (2d Cir. 1949).

of an infringing copy, but upon the manufacturer's failure to give notice of intended use under Congressional license. For this reason every seller of his records may be held as an infringer of copyright, notwithstanding that the statutory license was not cancelled.[19]

The decisive act or omission is that of a person over whom the seller has no control. Nor is there any point in time at which the seller's liability is fixed. Literal compliance by the manufacturer with statutory directions governing notice is not necessary. He may give notice of intended use and pay statutory royalties at any time, freeing records as to which royalties are paid from further contribution or infirmity.[20] The seller's amenability to suit and responsibility are, under the ruling below, dependent upon the statutory status of the records involved, and this he cannot govern. Nor is there any provision for notice to him by the copyright owner. Thus, the copyright proprietor may have an award against the seller and later recover from the manufacturer who belatedly files notice of use, although this last recovery, if it embrace royalties on records theretofore made, would free them. If the order of the actions were reversed, the seller would conceivably not be liable at all. Such a capricious result may be extreme, but, the petitioner submits, is entirely possible.

(d) The Copyright Act has been used, with the aid of the courts, for purposes not embraced within its scope. The respondents do not conceal their intention by this action to reach record pirates, so-called, through dealers. Since records themselves are not subject of copyright, and

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[19] Section 101(e) recognizes the continued existence of the license by provision for a *temporary* injunction against the manufacturer's operations under it until the full amount of the award based on his failure to give the notice is paid. (Emphasis supplied.)

[20] *G. Ricordi & Co.* v. *Columbia Graphophone Co.*, 263 Fed. 354 (2d Cir. 1920).

rights of artists whose performances are pirated are also in a different field, the use of the law of statutory copyright in order to attack indirectly manufacturers who may not easily be brought to account is a distortion of the basis of the law. The development of methods of reproducing sound has brought new problems, but these should not be resolved in the fashion which was here employed. The relief is with the legislature.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be be granted.

Abraham M. Lowenthal,
Attorney for Petitioner.

Leon G. Telsey,
Counsel for Petitioner.

Dated: December 18, 1957

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of September, one thousand nine hundred and fifty-seven.

Present: HON. CARROLL C. HINCKS
HON. J. EDWARD LUMBARD
HON. STERRY R. WATERMAN
Circuit Judges.

SHAPIRO, BERNSTEIN & Co., *et al.*, Plaintiffs-Appellants, vs. SAM GOODY & PORTEM DISTRIBUTING Co., Defendants-Appellees.	CIV. 93-202

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and action remanded in accordance with the opinion of this Court; with costs to the appellants.

A. DANIEL FUSARO, Clerk.

By RALPH C. CURCIO,
Deputy Clerk.

Appendix B

Sections 1(e), 101(b) and 101(e) of the Copyright Act (Act of March 4, 1909, c. 320; 35 Stat. 1075; 17 U.S.C.).

§1. *Exclusive rights as to copyrighted works.*

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

• • • • • • •

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided,* That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the

number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

The reproduction or rendition of a musical composition by or upon coin operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

§ *101 Infringement*

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

* * * * * *

Appendix B

(b) *Damages and Profits; Amount; Other Remedies.*—

To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of $100; and in the case of infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of $5,000 nor be less than $250, and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the

actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

First. In the case of a painting, statute, or sculpture, $10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, $50 for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, $100 for the first and $50 for every subsequent infringing performance; in the case of other musical compositions $10 for every infringing performance;

* * * * * *

(e) *Royalties for use of mechanical reproduction of musical works.*—Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section 1, subsection (e), of this title: *Provided also,* That when-

ever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section 1, subsection (e), of this title, by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 238—October Term, 1956.

(Argued February 13, 1957 Decided September 28, 1957.)

Docket No. 24392

SHAPIRO, BERNSTEIN & Co., INC., GERSHWIN PUBLISHING CORPORATION, EDWARD B. MARKS MUSIC CORPORATION, MILLER MUSIC CORPORATION, LEWIS MUSIC PUBLISHING COMPANY, INC., and MUTUAL MUSIC SOCIETY, INC.,

Plaintiffs-Appellants,

HELEN D. MILLER, Individually and as Executrix of the Estate of Alton G. Miller, Deceased,

Plaintiff,

—v.—

SAM GOODY and PORTEM DISTRIBUTING, INC.,

Defendants-Appellees,

SIDNEY TURK and HAROLD GROSSBARDT, individually and doing business as COLONY RECORD & RADIO CENTER, COLONY RECORD & RADIO CENTER, INC., ARCADE MUSIC SHOP, INC., RIVOLI MUSIC CENTER, INC., and JOSEPH KRUG, individually and doing business as A. F. N. RECORD CO.,

Defendants.

Before:

HINCKS, LUMBARD and WATERMAN,

Circuit Judges.

Appendix C

The plaintiffs, other than Helen D. Miller, individually and as executrix, appeal from a summary judgment of the United States District Court for the Southern District of New York, Kaufman, *J.*, 139 F. Supp. 176, dismissing their complaint for copyright infringement for unfair competition against the sellers of unauthorized phonograph records which mechanically reproduced the plaintiffs' copyrighted songs. *Reversed and remanded.*

JULIAN T. ABELES, of Abeles & Bernstein, New York, N. Y., *for plaintiffs-appellants.*

A. M. LOWENTHAL, of Telsey & Lowenthal, New York, N. Y. (Leon G. Telsey, on the brief), *for defendant-appellee, Sam Goody.*

HINCKS, *Circuit Judge:*

The plaintiffs-appellants, music publishers, and the defendants-appellees, Goody and Portem Distributing, Inc., moved for summary judgment on the following facts.

Joseph Krug, an original defendant below, manufactured two long-play phonograph disks on which were recorded propaganda radio broadcasts made by Major Alton "Glenn" Miller and his orchestra during the Second World War. These records included nine copyrighted musical selections the copyrights to which were owned by the six publisher-appellants each of whom had previously authorized its said copyrighted selections to be recorded. However, Krug had not been licensed to make the recordings involved, nor had he filed the notices nor paid the statutory royalties required by 17 U. S. C. A. 1(e) and 101(e).

The records were labeled "Major Glenn Miller and His A.E.F. Orchestra," "An A.F.N. Presentation." The same legends were on the jackets which also bore a photograph

of Miller in uniform. On both disk and jacket the customary disclosure of the manufacturer was absent except for the cryptic reference to "A.F.N." Krug, who made the records by tape recording off-the-air radio broadcasts, was thus spared the expense to which "legitimate" record producers are put for the talent of musical performers and the skill of recording technicians. Such practice is known to the trade as "disklegging," "bootlegging" or record "piracy."

Krug sold these records to dealer customers including the defendants, Sam Goody and Portem Distributing, Inc., who, in turn, sold them to the public at a considerably lower price than those produced by the Radio Corporation of America to whom the Millers, in so far as they had power to do so, had given exclusive rights to make and sell records of the performance involved.

It is a curious fact that although the Copyright Law has remained without relevant change since 1909 this case should present a question both basic and novel. Does either the Copyright Act or the common law provide copyright owners with a remedy against non-manufacturing sellers of unauthorized phonograph recordings of copyrighted songs?

On this appeal, we are concerned only with the rights of copyright owners. The plaintiff, Helen D. Miller, suing for the estate of her husband, is not a party to this appeal and her claims are not before us. Nor is the defendant Joseph Krug a party to the appeal because the appellants after obtaining a default judgment against him, 125 F. Supp. 348, agreed to a dismissal, with prejudice, as to the action against him upon the payment to them of $2,000 which, the appellants claim, was compensation for some of the expenses of the suit. In releasing Krug the appellants reserved all rights against the other defendants, including the appellees.

Appendix C

In 1908 the Supreme Court held that player piano rolls were not "copies" and hence did not infringe musical copyrights. *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U. S. 1. The rationale of the opinion clearly included phonograph records within that group of mechanical reproductions which were not deemed to be copeis for purposes of the then existing Copyright Act. Partially in response to that decision, the House Committee on Patents of the 60th Congress reported out a bill, which was later enacted and is now the law, carefully limiting the effect of the *White-Smith* decision. But by the very structure of the new law the case was not "overruled," as is best shown by the words of the Committee itself, *viz.*:

> "Your committee have felt that justice and fair dealing, however, required that when the copyrighted music of a composer was appropriated for mechanical reproduction the composer should have some compensation for its use and that the composer should have the further right of forbidding, if he so desired, the rendition of his copyrighted music by the mechanical reproducers. How to protect him in these rights without establishing a great music monopoly was the practical question the committee had to deal with. The only way to effect both purposes, as it seemed to the committee, was, after giving the composer the exclusive right to prohibit the use of his music by the mechanical reproducers, to provide that if he used or permitted the use of his music for such purpose then, upon the payment of a reasonable royalty, all who desired might reproduce the music." House Rep. #2222 on H. R. 28192, 60th Cong. 2d Sess., p. 6.

The provisions necessary to implement the legislative scheme were incorporated into the 1909 Act and have remained unchanged to the present time. We set them forth

in the margin.[1] Section 1(e), by its terms, concerns the compulsory licensing of the "manufacturer" of mechanical reproductions of the copyrighted work, and provides that if the 2¢ per "part" royalty is not paid by the manufacturer, the court in its discretion may award as damages to each owner whose copyright is infringed by the record ("part") the 2¢ royalty value plus three times that amount.

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[1] "§ 1. *Exclusive rights as to copyrighted works*

* * * * *

"(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided*, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to re-

Appendix C

Section 101 provides that whenever the copyright owner has permitted the making of one mechanical reproduction the unauthorized "manufacture, use or sale" of a record (mechanical reproduction) constitutes an infringement and entitles the owner to an injunction and a recovery, in lieu of profits and damages, of the royalty provided in §1(e). It also directs "any person" who, in the

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produce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

"In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

"The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

"§ 101. *Infringement*

* * * * * *

"(e) *Royalties for use of mechanical reproduction of musical works.*—Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacturer, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section 1, subsection (e), of this title: *Provided also*, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall

absence of a license agreement, intends to use the copyrighted music, once it has been licensed to another, to serve notice to that effect on the copyright owner thereof and the copyright office. It further provides that, upon failure to comply with the compulsory licensing provision, the court in its discretion may award the owner "a further sum, not to exceed three times the amount provided by section 1, subsection (e) of this title, by way of damages * * *."

A natural reading of these sections leads us to the conclusion that a seller of unauthorized records of copyrighted music, although having no connection with the manufacturer, is an infringer and liable for damages which the Act provides. But the appellees urge us to eliminate from the phrase "manufacture, use, or sale of interchangeable parts, such as disks * * *" (§ 101(e)) the word "sale." Failure to do so, they contend, would create conflict with what the appellees claim is the basic purpose of the entire compulsory licensing scheme. To substantiate this, the appellees point to certain alleged injustices which would result from such interpretation.

First, appellees claim that such construction would hinge their liability as non-manufacturing sellers on the acts or omissions of the manufacturer, over whom they have no control. Even if this be true, it is no more burdensome than the liability of any non-manufacturing seller who, without knowing it, infringes a copyright. Such sellers generally have no more control over their supplier's compliance with the Act than those appellees, yet are held

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serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in his discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section 1, subsection (e), of this title, by way of damages and not as a penalty, and also a temporary injunction until the full award is paid."

liable. *Woolworth Co.* v. *Contemporary Art*, 344 U. S. 228, 229. *Cf.* 35 U. S. C. A. § 271(a). That records are not "copies," will not save the record bootlegger from the rule of the *Woolworth* case because § 101(e) clearly classifies the sale of unauthorized records as an infringement.

Also, the appellees urge that in their case it would be unjust to burden them with the impractical responsibility of ascertaining at their peril whether records they sell have been authorized by the Copyright Act or by the owners of all copyrighted music thereon, especially in view of the fact that other authorized recordings (since not "copies") do not carry a compulsory copyright notation. But this burden, we think, is not unduly onerous; most reputable manufacturers can easily demonstrate to their customers that their records are authorized. When dealing with unknown manufacturers the burden on a purchaser for resale to exercise caution is no greater than that required of the buyer of any merchandise which might infringe. Cf. *Woolworth Co.* v. *Contemporary Art, supra.* Since, as will be shown, the dollar liability for selling unauthorized records is usually less (because of the generally small value) than that imposed upon other non-manufacturing infringers, 17 U. S. C. A. § 101(b), we cannot say that the burden of diligence is so great as to overcome what we would otherwise conclude is the statutory scheme.

The appellees further urge that it would be anomalous to hold the seller liable, when the manufacturer, according to the doctrine of *G. Ricordi & Co.* v. *Columbia Graphophone Co.*, 2 Cir., 263 Fed. 354, may at any time, even after judgment, file for a compulsory license and free the subject records from their infringing status. This argument misconceives the holding of the *Ricordi* case. As we understand that case, there were two sets of records, one voice, the other violin, both manufactured by the defendant therein and both using the same copyrighted music. The voice records were originally the subject of the suit and we

held that the defendant, notwithstanding his obtaining during the course of the suit a license for violin records, which he seemingly had not manufactured before suit, was liable for statutory damages for the voice records. We held that the subsequent violin license estopped the defendant from attacking the basic validity of the copyright in issue, but this was all we held. And this aside, there is nothing anomalous in a statutory provision for a claim for the 2¢ royalty against a seller who at the time of his sale was an infringer. To declare that a royalty payment frees the record from further contribution (§ 1(e)) is a far cry from saying that the payment exonerates any and all prior infringers from liability already accrued.

The appellees point to our decision in *Shilkret* v. *Musicraft Records*, 2 Cir., 131 F. 2d 929, as an instance where we did not give some words of the Copyright Act their literal interpretation. In that case, a strict construction would have created an obvious conflict in the statute. Here, there is no such conflict: our interpretation accords significance and effect to all the words of the statute. *Ex parte Public Bank*, 278 U. S. 101, 104. We hold that the appellees, as sellers of unauthorized records, are liable under § 101 (e).

There is no room for arguing that even if § 101(e) does apply to sellers and makes them liable for infringement there is no penalty prescribed,—only injunctive relief is provided. Under this argument the phrase allowing plaintiff to recover a "royalty as provided in section 1, subsection (e)" is limited to manufacturer defendants since they are the only defendants referred to in § 1(e). But this approach overlooks the fact that the manufacturer-defendants under § 1(e) (authorized manufacturers) can never be the same persons as the manufacturer-defendants (unauthorized manufacturers) under § 101(c). Since it is plain that the remedy of § 101(e) extends to unauthorized manufacturers who could not be sued under § 1(e), we think it

equally apparent that the reference in § 101(e) to the "royalty as provided in" § 1(e) was intended to limit not the class of potential defendants but only the amount of the royalty. This view is supported by the declaration in § 101(e) that "the plaintiff shall recover" rather than that "the defendant shall be liable." It is further supported by the fact that the phrase appears in the part of § 101(e) concerned with measure of recovery and not with liability.

We next come to the appellants' contention that they each may have a recovery under § 101(e) which in no event may be less than the $250 minimum per infringement provided in § 101(b). We conclude, as did Judge Kaufman, that under the statutory scheme the general damage provisions of § 101(b) are not applicable to the infringement of a musical copyright by mechanical reproduction.

Section 101(b) indicates that the measure of recovery is all the damage suffered by the owner plus all profits of the infringer. However, in lieu of proof of "actual damages and profits," because of the difficulty of proof, *Brady* v. *Daly*, 175 U. S. 148, 157, the court may award damages as may appear just between general limits, *viz.*, a minimum of $250 and a maximum of $5,000. The specific limits set in § 101(b) for the types of infringement listed in the four subsections are merely guideposts for the courts to employ between the general limits. *Jewell-LaSalle Realty Co.* v. *Buck*, 283 U. S. 202; *Westerman* v. *Dispatch Printing Co.*, 249 U. S. 100.

But when the Copyright Act of 1909 extended copyright control to the reproduction of music by mechanical parts a different regulatory plan was adopted and a different basis of recovery was provided which, we think, is in essential conflict with the measure of recovery under § 101(b). For the royalty under the compulsory license provided by § 1(e), which Congress set arbitrarily at 2¢ per record, was a form of statutory compensation which by its very nature measured the damages resulting from its non-payment.

That this was so is indicated by the wording of § 101(e) which provided for the recovery of the royalty "in lieu of profits and damages." Since, under the statutory scheme, recovery of the statutory royalty afforded the measure of compensation which Congress contemplated for the owner, the difficult problem of proof which is presented in cases not controlled by a royalty does not arise and there is hence no need in such cases for the application of the $5,000 maximum and a $250 minimum which Congress provided for other types of infringement under § 101(b) as a substitute for proof of actual damages. For cases under §101(e), the basic royalty of 2¢ is both maximum and minimum: as to this basic amount there is no discretion. In view of this conflict between the scheme envisaged by § 101(b) and that of § 101(e), we think the specific statutory sections concerned with parts serving to reproduce mechanically the musical work, which are also textually and chronologically later than § 101(b), should control the general provisions. *Townsend* v. *Little*, 109 U. S. 504; *United States* v. *City of Chester*, 3 Cir., 144 F. 2d 415; *United States* v. *Windle*, 8 Cir., 158 F. 2d 196.

This brings us to another troublesome question which also is novel: Does the owner's recovery against the seller, like his recovery against the manufacturer, include in addition to the 2¢ royalty a discretionary allowance not to exceed the royalty trebled, or is it limited to the 2¢ royalty?

As to this, we hold that the recovery against a seller is limited to 2¢ per record. Certainly in the first part of § 101(e), which casts liability for infringement upon sellers, there is no provision for the addition to the award of a sum comprising the royalty trebled: the provision therein contained for allowance against a seller of "a royalty as provided in section 1, subsection (e)" points solely to that part of § 1(e) which creates a statutory royalty of 2¢, not to the next to the last paragraph in § 1(e) which gives the court discretion to increase the award by the royalty

trebled. The language providing for a recovery against the seller of "a royalty" is scarcely adequate to provide a recovery of a sum amounting to the royalty plus the royalty trebled. Moreover, the proviso which comprises the second part of § 101(e) is limited to a person who, "in the absence of a license agreement, *intends to use* a copyright musical composition upon parts of instruments * * *, relying upon the compulsory license provision of this title." The language of this limitation is apt for application to a manufacturer,—but scarcely applicable to a dealer who generally does not *intend to use a composition upon the parts of instruments*, etc. Indeed, if the enlarged recovery created by the proviso was intended, like the remedy provided in the first part of § 101(e), to apply to sellers as well as manufacturers, the limitation of the proviso, quoted above, would have been entirely redundant.

There is also a certain amount of ambiguity as to the effect of § 116 of Title 17 on § 101(e). Section 116 of Title 17 declares that in "all" actions under that title "full costs" shall be allowed and the prevailing party, in the discretion of the court, may be awarded reasonable attorney's fees. Although this general provision has no exceptive clauses, § 1(e) contains a specific provision making both "taxable costs" and counsel fees discretionary when the plaintiff copyright owner prevails. Section 101(e) is silent as to both factors and there is no reason to read § 101(e) as limited by § 1(e) since we have shown that these two sections are directed at two different situations. We believe that the general provisions of § 116 are applicable to cases under § 101(e) so that "full costs" are to be allowed and the prevailing parties will be entitled to reasonable fees in the discretion of the District Court.

The appellees would avoid any recovery by the appellants under § 101(e) because the appellants have settled with Krug. This, they claim, freed the records involved in this action from further contribution to the copyright proprietors. The settlement thus invoked was made pursuant

to a stipulation of the parties after the pending action had been brought and after the defendant Krug, who had suffered a default judgment for failure to answer the complaint, had filed a counterclaim against the plaintiff Helen D. Miller, individually and as executrix. By the stipulation it was provided that Krug would discontinue his counterclaim against the said Miller and would pay the plaintiffs $2,000 "on account of the costs and expenses incurred by the plaintiffs, other than Helen D. Miller individually et cetera, in their proceedings herein against said defendant" and that the plaintiffs would "release and forever discharge * * * Krug * * * from all rights, claims, demands * * * concerning the subject matter of the above entitled action * * *; without prejudice to any and all rights, claims, demands * * * of the * * * plaintiffs * * * against the defendants * * * other than * * * Krug * * *; the above named plaintiffs * * * expressly excepting and reserving, and not hereby intending to settle * * * any rights, claims, demands * * * which they * * * may or can have against Krug * * * and any and all others * * *." The court below, after reading this stipulation, entered the order of discontinuance therein provided for and the settlement was consummated.

To assess the impact of this settlement on the situation presented here, it is necessary first to determine whether the liability of the defendant-infringers under the Copyright Act is to any extent joint. We think not: we hold that the liability of each infringer, whether he be manufacturer, distributor or retailer, is several. For § 101(e) clearly defines infringement in the alternative, *viz.*: "unauthorized manufacture, use, or sale. From a normal reading of these words it would appear that the unauthorized manufacture of a set of "parts" or records is an infringement of each copyright and that unauthorized sale of some or all of that set is a separate infringement. *Westerman Co.* v. *Dispatch Printing Co., supra.* This would mean that the manufacturer and the seller are each

liable as infringers. The appellees argue that both the manufacturer and the seller may not be held liable because §1(e) expressly provides that a 2¢ royalty payment will free the record from further contribution. But, as we have said earlier, this 2¢ payment, while freeing the record, does not automatically terminate the liability of prior infringers. Since the liability of each defendant for royalties is several and independent, it follows that the appellees may not claim that any part of Krug's payment of $2,000 reduces their liability for royalties.

However, the settlement with Krug is a factor to consider in the assessment of costs which, we have seen, are mandatory for the prevailing party. Since the appellants have chosen to proceed against Krug and numerous other alleged infringers in this one action, any money Krug paid which was fairly allocable to the costs of this action should be allowed as a set-off against the liability, if any, of the other defendants for costs.

Similarly, when the question of plaintiffs' counsel fees is presented, if the District Court should decide to exercise its discretion and award fees, after fixing the amount to be allowed it should take into consideration the amount already paid by Krug which is fairly allocable to such fees and reduce the remaining liability, if any, of the other defendants by that amount.

The appellants, in addition to their statutory action, alleged a common law claim for "unfair trade practices and unfair competition" which was dismissed because the music in issue, having been published, was protected only by the Copyright Law, which afforded the sole measure of protection. The appellants claim that, notwithstanding publication of the songs, they retain common law rights in the titles and may on that account prevent the appellees' use thereof. There is no claim here that Krug or the appellees meant to, or that their labeling did in fact, mislead the public as to the musical content of the records. If the appellants' titles were used, it was because their songs were used. Absent

the Copyright Law, this would be proper. *National Comics Publications* v. *Fawcett Publications*, 2 Cir., 191 F. 2d 594. Titles are protected only to the extent necessary to prevent confusion on the part of the public as to the identity of the composition covered by the title. *Warner Bros. Pictures, Inc.* v. *Majestic Pictures Corp.*, 2 Cir., 70 F. 2d 310, 312. Where, as here, there is no confusion and no deception, protection is denied *Becker* v. *Loews, Inc.*, 7 Cir., 133 F. 2d 889, 893, cert. den. 319 U. S. 772; *Manners* v. *Triangle Film Corp.*, 2 Cir., 247 Fed. 301, 303; *International Film Service Co.* v. *Associated Producers*, 273 Fed. 585, 587 (S. D. N. Y.).

Appellants urge that the District Judge dismissed this common law count without passing on the merits. That this contention is demonstrably false may be seen from the District Court's opinion. 139 F. Supp. at 187. The disposition below of this common law claim was on the merits and was correct.

It certainly is true that the Act of 1909 in its provisions extending copyright control of musical compositions and mechanical parts is in several respects difficult to interpret. However, we think the foregoing rulings and interpretations are fairly indicated by the text of the Act and the structure of the statutory scheme. As Judge Kaufman so well said below, it is only for Congress to decide whether the protection and control afforded the proprietor is "fair," or "adequate" either from the private or the public viewpoint, or is the best possible balance between private and public interests.

The upshot of our rulings requires that the summary judgment in favor of these appellees be reversed. On remand, it will be for the court to determine in accordance with the foregoing opinion whether each defendant infringed and, if so, to enter an appropriate judgment against each such defendant which shall reflect such determinations as shall be made with respect to costs and counsel fees.

Reversed and remanded.

Appendix C

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. 93-202

HELEN D. MILLER, Individually and as Executrix of the Estate of Alton G. Miller, Deceased, SHAPIRO, BERNSTEIN & Co., INC., GERSHWIN PUBLISHING CORPORATION, EDWARD B. MARKS MUSIC CORPORATION, MILLER MUSIC CORPORATION, LEWIS MUSIC PUBLISHING COMPANY, INC., and MUTUAL MUSIC SOCIETY, INC.,

Plaintiffs,

against

SAM GOODY, SIDNEY TURK and HAROLD GROSSBARDT individually and doing business as COLONY RECORD & RADIO CENTER, COLONY RECORD & RADIO CENTER, INC., ARCADE MUSIC SHOP, INC., RIVOLI MUSIC CENTER, INC., PORTEM DISTRIBUTING, INC. and JOSEPH KRUG individually and doing business as A. F. N. RECORD Co.,

Defendants.

APPEARANCES:

ABELES & BERNSTEIN, Attorneys for Plaintiffs, Shapiro, Bernstein & Co., Inc. Gershwin Publishing Corporation, Edward B. Marks Music Corporation, Miller Music Corporation, Lewis Music Publishing Company, Inc. and Mutual Music Society, Inc. 745 Fifth Avenue New York 22, N. Y. By Julian T. Abeles, of Counsel.

TELSEY, LOWENTHAL, ROTHENBERG & MASON Attorneys for Defendant Sam Goody 55 Liberty Street, New York 5, N. Y. By Leon G. Telsey Abraham M. Lowenthal, of Counsel.

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RAUCHER & LEFTOFF Attorneys for Defendant Portem Distributing, Inc. 11 West 42nd Street New York 36, N. Y. By Morris B. Raucher, of Counsel.

IRVING R. KAUFMAN, D. J.

Some time in 1951, defendant Joseph Krug, a phonograph record salesman, came into possession of certain acetate disks recording propaganda radio broadcasts made by Glen Miller and orchestra when Mr. Miller was a major in the United States Army during World War II. Krug tape-recorded the selections on those disks, and from the tapes he made the matrices, plates, molds, stamps, etc. necessary for the manufacture of records; then, doing business as the A.F.N. Record Company, he commenced to manufacture and sell two ten inch long-play records of the Miller performance. The jackets in which the records were sold carried a picture of Glenn Miller in his army uniform and the captions, "Major Glenn Miller and His A.E.F. Orchestra", "An AFN Presentation". The labels on the records themselves were similarly captioned.

Of the thirteen musical selections contained on both of these records, nine were copyrighted musical works whose copyrights were held by various musical publishers.[1] These

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[1] The selections and publisher-proprietors were as follows:

Name of Publisher	*Title of Composition*
Shapiro, Bernstein & Co., Inc.	"In the Mood"
Gershwin Publishing Corporation	"Summertime"
Edward B. Marks Music Corporation	"Poinciana"
Miller Music Corporation	"Great Day"
Lewis Music Publishing Company, Inc.	"Tuxedo Junction"
Mutual Music Society, Inc.	"American Patrol"
" " " "	"Song of the Volga Boatman"
" " " "	"Anvil Chorus"
" " " "	"A String of Pearls"

copyright proprietors had each previously permitted the recording of the selections involved; therefore, under the so-called compulsory licensing provisions of the copyright law 17 U.S.C. 1(e) and 101(e), which deal specifically with mechanical reproduction of musical compositions, Krug was entitled to manufacture recordings of these selections provided he filed notice of his intention to do so, and provided he paid the copyright proprietors a royalty of 2 cents for each record manufactured. Krug, however, neither filed the requisite notice nor paid the statutory royalties, and he thereupon became an infringer and subject to statutory damages.[3]

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[3] The two mechanical reproduction sub-sections of the copyright law provide:

§ 1. *Exclusive rights as to copyrighted works.*

* * *

(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided*, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall not include the works of a foreign author or composer unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. And as a condition of extending the copyright control to such mechanical reproductions, that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the

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Among Krug's record dealer customers were the Portem Distributing, Inc. and Sam Goody the latter reputed to be one of the largest record dealers in the world. Both Mr. Robert E. Pare, president of Portem Distributing, Inc. and Mr. Goody had been acquainted with Mr. Krug in his capacity as a record salesman for the Colony Record & Radio Center, but both assert that they found nothing surprising or suspicious when it appeared that he was also in the business of manufacturing records under his own label. They made no effort to ascertain whether he had fulfilled his obligations under the copyright law, nor, seemingly, did they make inquiry as to Krug's authority to use Glenn Miller's picture, and to re-record his per-

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[2] *Continued.*

number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month. The payment of the royalty provided for by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit. It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs.

formance.[3] Both assert that because of the large number of record manufacturers in the field, ranging from large-scale producers to small operations similar in size to Krug's, and because of the compulsory licensing provisions of the copyright law, they cannot and do not attempt to ascertain whether every manufacturer with which they deal has taken the proper steps required under that law.

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[3] *Continued.*

§ 101. *Infringement.*

* * *

(e) *Royalties for use of mechanical reproduction of musical works.* Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section 1, subsection (e), of this title: *Provided also,* That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do, the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section 1, subsection (e), of this title, by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

These two sections have remained unchanged since the Copyright Act of 1909, although initially Section 101(e) was called Section 25(e).

[3] It is still uncertain whether Krug was required to get authority from the Miller estate, and this phase of the case is yet to be tried. The uncertainties surrounding the law in this area of "dubbing" recordings will be discussed in note [5] *infra.*

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In May of 1954, Helen D. Miller, who is Glenn Miller's widow and executrix of his estate, joined with the six publishing companies who between them own the nine musical copyrights which had been infringed, and together they brought suit against Krug individually and doing business as A.F.N. Record Company, and against Sam Goody, Portem Distributing, Inc. and several other record dealers who had allegedly bought infringing records from Krug and resold them to the public. Helen D, Miller's complaint was based on unfair trade practices and unfair competition as she alleged that she had the exclusive right to control the recording of Glenn Miller's performances, that she and her husband before her had negotiated exclusive contracts with RCA Victor which fact was well known in the industry, that Krug's records were of inferior quality, and that he and the defendant dealers, therefore, had damaged the value of Glenn Miller's name and reputation by selling these technically inferior recordings, and had also interfered with and damaged her property rights in the name, likeness and music of Glenn Miller, which rights have earned her substantial royalties from RCA Victor and other companies which have paid to use the name and likeness of Glenn Miller in the motion picture, radio and sheet music industries. The complaint of the publishers was based on Krug's violation of the copyright law and on the resale by the dealer defendants of those infringing records, which sale, the publishers assert, was also a violation of the copyright law subjecting the dealers to liability for statutory damages.

The plaintiffs proceeded first against Krug, and on October 5, 1954, the publisher plaintiffs made a motion for a default judgment against Krug who had failed to answer their complaint or take any other steps with respect to it. The default was granted, and by its terms, Krug

was enjoined from infringing the musical copyrights involved; a Special Master was appointed to take testimony and compute the amount of damages and royalties owing; and Krug was ordered to turn over to the Special Master all the materials with which he had made the infringing records, provided that upon satisfactory proof to the Court that Krug had filed the requisite notice and paid the royalties found due, the injunction and impounding order would be lifted. *Miller* v. *Goody*, 125 F. Supp. 348 (S.D N.Y. 1954). Computation proceedings were started, and Krug was called as a witness before the Special Master; before the royalties owing could be ascertained, however, the publisher plaintiffs and Helen D. Miller entered into a stipulation of settlement with Krug. Under its terms, the injunction against making the offending records was made permanent; Krug turned over to the plaintiffs all the materials with which he had manufactured, labeled and jacketed the recordings; and he paid the plaintiffs other than Helen D. Miller $2,000 "on account of the costs and expenses incurred * * * in their proceedings" against him. All the plaintiffs, while discharging Krug and his heirs, executors and administrators from any further liability arising from this cause of action, expressly reserved all their rights against the other defendants in the case.

By the present motion, the plaintiff publishers are pressing their cause of action separately from that of Helen D. Miller. They seek summary judgment against Sam Goody and Portem Distributing, Inc., two of the defendant dealers. Although the publishers' cause of action has its roots in Sections 1(e) and 101(e) of the copyright law, which sections deal with the mechanical reproduction of music, they seek to recover damages provided for in Section 101(b) of the Act. This latter section, which deals with copyright infringement generally,

provides for a minimum recovery of $250. per infringement (with certain enumerated exceptions) where infringement is found but the number of infringing copies sold or published is uncertain. The publishers assert that the dealer defendants infringed their copyrights when they sold the A.F.N. records. The publishers urge that since each defendant admits the sale of some of these records (though the number sold is in dispute), and since under the copyright law intention to infringe is immaterial, they are entitled to a recovery of $250. per copyright from each defendant.

The two dealer defendants herein admit in their brief that "the sale or vending of an unauthorized copy of a copyrighted article by anyone is an infringement of the copyright irrespective of the position of the vendor in the distributive process, his bona fides, his innocence, or the unknown peril to which he may have been subjected." And this is undoubtedly the law. *F. W. Woolworth Co.* v. *Contemporary Arts*, 344 U. S. 228 (1952); *DeAcosta* v. *Brown*, 146 F. 2d 408 (C.C.A. 2, 1944). Defendants agree, therefore, that the question of their asserted innocence of evil intent is immaterial, and that the case is a proper one for determination by summary judgment since no facts are in issue nor is there need for adjudicating credibility of witnesses. They contend, however, that upon the law the judgment must be in their favor because a record is not a copy of a musical composition within the meaning of the copyright law, and the sale of that which is not an infringing copy is not a violation of the copyright law under Section 101(b) or any other section. They urge that Congress specifically refused to label a recording as a copy and thereby give the musical copyright proprietor complete protection from mechanical reproduction of his music; instead, Congress made specific limited provisions to ensure that record manufacturers pay some price for the use of a composer's work. The

dealers contend that those limited provisions, Sections 1(e) and 101(e) are the only rights given to the copyright proprietor when dealing with mechanical reproductions, and they provide for recovery solely against the manufacturer, and then only in certain specified amounts dependent on the number of records manufactured, there being no minimum penalty provision as there is for unauthorized copying. In sum, the defendants argue that under the law the non-manufacturing seller, no matter what the state of his knowledge, is not accountable to the proprietor or to anyone for his sale of infringing records.

A painstaking analysis of the legislative history of the Copyright Act of 1901 and the contemporary comment about it, and a thorough study of the history of the recording industry since that act went into effect, have led me to conclude regretfully that the defendants' contentions must be sustained. In reaching this conclusion, I must confess that I have not been moved by defendants' protestations of innocent intent, which I question: Krug's lack of business address, business stationery or even a telephone listing, and his sale of Glenn Miller recordings under an unknown label and in jackets which stated that the records had been taken from radio broadcasts without any showing of approval from the Miller estate, were clear indications that he was a record pirate.[4] While the question of whether a performer like Mr. Miller is protected from such re-recordings has not yet been

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[4] Record pirates or "diskleggers" as they have been called, are manufacturers who re-record or "dub" recordings made by legitimate companies and sell them competitively. In this manner, they avoid having to pay the performers for their time, and they have the benefit of the initial recording company's talents in getting the finest rendition possible. Ordinarily, they also omit payment of the copyright, although, as far as the copyright law is concerned, even a pirate has the right to record copyrighted musical compositions provided he files notice of intent and pays the royalties.

definitively settled,[5] and is indeed the subject of another phase of this lawsuit, it is fairly well known in the trade that most record pirates usually do not pay the necessary royalty fee, particularly when they are operating on a small scale as was Mr. Krug. Note, *Piracy on Records*, 5 Stanford L. Rev. 433 (1952-53). It appears, however, that the law is such that regardless of defendants' awareness of Mr. Krug's probable infringement of any copyrighted selections on the recordings, their acceptance and resale of these records did not violate the copyright laws.[6]

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[5] *Compare Waring* v. *WDAS Broadcasting Station*, 327 Pa. 433, 194 A. 631 (1937); *RCA Manufacturing Co.* v. *Whiteman*, 114 F. 2d 86 (C.C.A. 2) *cert. denied*, 311 U. S. 712 (1940); *Capitol Records* v. *Mercury Records Corp.*, 221 F. 2d 657 (C. A. 2, 1955) Hand, J. dissenting. The question of the rights of performers in their recorded performances, and of recording companies in their talent in making initial recordings, as against record pirates and others who broadcast the original recordings, has been the subject of numerous legal articles. See *e.g. Chafee, Reflections on the Law of Copyright*, 45 Col. L. Rev. 719, 733 et seq. (1945); Comment, *Protection of the Performing Artist's "Interpretative Rendition" Through the Arranger's Copyright*, 37 Ill. L. Rev. 245 (1942-43); Note, *Rights of Performers and Recorders Against Unlicensed Record Broadcasts*, 49 Yale L. J. 559 (1939-40). The question of whether there is any common law protection for these artists and recording companies either via common law copyright or unfair competition has been considered by few courts so far and different conclusions have been reached. The weight of legal comment seems to be that solution will have to be sought by amendment of the copyright law which, at present, does not permit the copyrighting of a recording. These articles point out that this problem has been before Congress many times but because of the many conflicting interests involved, a satisfactory solution has not been reached and the copyright law has remained unchanged.

[6] A corollary to this conclusion, to be discussed *infra*, is that the defendants did not violate any common law rights of the copyright proprietors either, because as will be pointed out, the proprietors are in an area wholly governed by statute and cannot make even the tenuous claims to common law protection in the absence of statute which are being made by recording companies and performing artists in their fight against pirates.

This conclusion makes unnecessary any consideration of other contentions raised by the defendants to the effect that the settlement with Krug released the dealers from liability.

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Under the copyright laws existing prior to 1909, "the author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition [had] the sole liberty of printing, reprinting, publishing, completing, copying, executing and vending the same." *White Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1, 9 (1907). This is similar to the protection accorded a copyright proprietor today under 17 U.S.C. 1(a); yet, in the *Apollo* case, *supra*, the Supreme Court held that this list of rights did not protect the copyright proprietor from one who mechanically reproduced the sound of a musical composition on a piano roll or similar mechanical device [e.g. recordings]. While agreeing that the purpose of the copyright laws was to protect intellectual conceptions, the Court maintained that it was the tangible result of the conception which alone was protected from copying, and the tangible result of the composer's art was the sheet music by which one versed in the art could read his score. The Court defined a copy of a musical composition as "a written or printed record of it in intelligible notation." The appeal of a copy must be to the eye, not the ear. It said, "It may be true that in a broad sense, a mechanical instrument which reproduces a tune copies it; but this is a strained and artificial meaning." *Id.* at 17. The Court found its conclusion regrettable in that record and piano roll manufacturers were thus getting a profitable use of musical compositions without paying value therefor, but it stated that this was a consideration properly addressed to the legislature and not to the courts.[7]

In the Copyright Act of 1909, Congress undertook to remedy this inequity and to grant some measure of protec-

[7] It must be noted that the Court addressed itself wholly to the question of statutory interpretation, and the question of whether Congress could constitutionally provide that a recording was a copy was not before it.

tion to musical copyright proprietors against those who were profiting by making recordings of their compositions which were incapable of being read but which served as parts of mechanisms which reproduced such compositions in sound. Congress did not, however, include mechanical reproduction of music in its definition of a copy, although to have done so would have been an easy solution, granting the musical proprietor complete copyright protection against mechanical reproduction. The reasons for not defining a recording as a copy were spelled out in the House Report accompanying the proposed bill.* Congress feared the creation of a giant music monopoly in which the big publishing houses, which owned most musical copyrights, would negotiate with the great recording companies for exclusive recording contracts—and such negotiations had actually been started in anticipation of a more favorable Supreme Court decision in the *Apollo* case. To avoid a music trust injurious to public and composer alike, and to still protect the composer in his work was the problem Congress faced. Its solution was to provide that the musical copyright proprietor could forbid all mechanical reproduction of his music, but once he licensed one company to record it, then all other manufacturers could so record provided they filed a notice of intent and paid a royalty of 2 cents per record. Manufacture in violation of these provisions was made enjoinable, and damages up to three times the amount of royalties due were to be awarded in cases of infringement. The report flatly stated, "It is not the committee's intention to extend the right of copyright to the mechanical reproductions themselves, but only to give control over the manufacture and use of

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* House Report #2222 on H.R. 28192, 60th Cong. 2d Session. Senate Report 1108 dealing with the same bill merely states that it adopts H.R. #2222 in toto.

such devices." Although the bill had been unanimously endorsed by the committees of both Houses of Congress, it did not pass unchallenged. Debate on the House floor, as in the committee, was centered on the "canned music" provisions. Detractors argued that putting a flat price on the copyright proprietor's property, *i.e.* 2 cents a record was an unconstitutional infringement of property rights, but the bill's defenders pointed out that copyright rights are strictly statutory, that prior to this bill the composer had no rights against mechanical reproduction, and Congress in giving him a right could limit or condition it. Further, they pointed out, the constitution speaks of promoting progress in science and the arts as the purpose of copyright protection, and a grant of right which could lead to a music monopoly would be a deterrent to such progress. Again and again, during debate references were made to the manufacturer's rights and duties, and it was clear that the committee considered that the 2 cents plus treble damages was all the relief it was providing, and that this was to be payable by the manufacturer. Cong. Record, March 31, 1909, pages 3765-3767, 3768-3770. The bill, as recommended and understood by the committee, was enacted into law and its provisions still govern today.

Legal commentators have criticized this law because of the limited protection given to musical copyright proprietors. In Shafter, *Musical Copyright*, pages 236-244 (1932), the royalty provisions are discussed solely in terms of the manufacturer, and Shafter points out that one disadvantage of the present law is the lack of an award for minimum infringement. In other instances of copyright law, he says, intentions and result are immaterial; if the infringement takes place, there is a minimum award—but this is not so in mechanical reproduction cases. He adds that fly-by-night manufacturers who falsify their books as to the number of records manufactured are a serious

problem in the industry. Similar critical comment is made in Weil, *American Copyright Law*, pages 63, 96-97, 489 (1917) which criticizes the fact that the proprietor is without apparent remedy against an insolvent manufacturer, except, of course, for injunction. No mention is made of a possible alternative recovery from a seller. Congressional unfriendliness towards extending the copyright of musical compositions to mechanical reproductions, and the failure of efforts to persuade Congress to provide less meagre relief were recently noted by the Court of Appeals for the Second Circuit in *E. B. Marks Music Corp.* v. *Foullon*, 171 F. 2d 905 (1949). The fact that mechanical reproduction is considered a separate area not under the general scope of the copyright law is also illustrated by the fact that the basic copyright texts deal with mechanical reproduction of music as a separate topic, and do not include it with their general discussion of copyright infringement. See *e.g.* Shafter, *Musical Copyright* (1932); Weil, *Copyright Law* (1917); Bowker, *Copyright, Its History and Its Law* (1912); Amdur, *Copyright Law and Practice* (1936).

Similarly, comment has often been made to the effect that a recording is not a copy within the meaning of the copyright law, and that distribution of such records is not publication. See *Capitol Records Co.* v. *Mercury Records Corp.*, 221 F. 2d 657, 659-662, 664-665 (C. A. 2, 1955); Nimmer, *Copyright Publication*, 56 Col. Law Rev. 185, 188 n. 34 (1956). The problem of mechanical reproduction of musical compositions is not specifically covered in the Universal Copyright Convention adopted in Geneva in 1952 by the Intergovernmental Copyright Conference sponsored by UNESCO. However, Article VI. of that Convention defines publication as "the reproduction in tangible form of copies of a work from which it can be read or otherwise visually perceived." In Dubin, *Copyright Aspects of Sound Recordings*, 26 So. Calif. L. Rev. 139-156 (1953), it is pointed out that p tting "aural" perception into this

definition of a copy would have caused confusion in the United States where records are not deemed to be publications.[9]

Despite this background of comment adverse to the claims made herein by the publisher plaintiffs, and despite the fact that except for one lawsuit brought in 1952 [to be discussed *infra*], the musical industry has operated under the assumption that the $250. minimum penalty does not apply to mechanical reproduction, and that the sole remedies for such recording are against the manufacturer as set forth in Sections 1(e) and 101(e), the publishers urge here that the copyright law can be and should be construed in favor of their contentions. They base their argument on the language in Section 101(e) which speaks of "infringement of such copyright by the unauthorized *manufacture, use or sale*" of recordings and other mechanical sound reproducing devices (Italics supplied). This subsection then states that the plaintiff is entitled to recover for such infringement and it does not specifically limit

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[9] This American view that recordings are not publications stems from the limited scope of the copyright law of 1909 and its rationale that records are not copies. This has caused confusion in another area of the musical industry; since a recording is not a copy of a musical selection, it cannot be filed under the copyright law which requires that a copy of the composition to be protected must be filed. With the current popularity of records as opposed to sheet music, a practice has arisen of releasing musical selections in recorded form before publishing the sheet music. The question arises, is such a recorded release a publication within the meaning of the copyright law which would deprive the composer of a right to later file a "copy" of his song and receive statutory protection. (Publication ends common law rights, and filing under the statute must be simultaneous with such publication, or there is a dedication to the public and all copyright protection is lost.) See Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. of Pa. L. Rev. 469 (1954-55); Chafee, *Reflections on the Law of Copyright*, *supra*. This question would not have arisen were a recording considered a copy within the meaning of the copyright law.

that right to recovery from the manufacturer. The publishers contend that there is a distinction between recordings made by a manufacturer who files notice of compulsory license but then fails to pay the royalties, and recordings made by a manufacturer who does not even file notice. The former they agree are covered exclusively by the royalty-treble royalty provisions. They urge, however, that the latter are records whose manufacture is unauthorized within the meaning of Section 101(e) and whose use or sale is an infringement of the Act. They contend that Section 101(e) with its limited treble damage provisions is the sole provision applicable only in situations where there has been a compulsory license agreement. Where there is no such arrangement, as was the case here, then there is regular copyright infringement and the other infringement sections, notably the minimum damage section [101(b)] are applicable. Since Krug did not even file the requisite notice, it is urged that his recordings fall into this latter category. The plaintiffs argue that if Section 101(e) is construed as applying only to the initial manufacture of such records, and as providing recovery only against such an unauthorized manufacturer, then the phrase "manufacture, use or sale" becomes meaningless, and this, they say, would be improper construction.

Although their argument has surface merit, particularly the contention that an adverse ruling will deprive the phrase "manufacture, use or sale" of any meaning, I find that plaintiffs' position cannot be sustained; for to uphold them here would be to discard the entire statutory royalty and treble royalty scheme so painstakingly worked out by Congress in its attempt to resolve conflicting interests. Further, such a ruling would create practical enforcement difficulties incapable of being handled by judicial decision.

Dealing with this latter problem first, it has been held that a manufacturer may, at any time, change his status from infringer to compulsory licensee by filing the requi-

site notice and paying the royalties due. In *G. Ricordi & Co., Inc.* v. *Columbia Graphophone Co.*, 263 Fed. 354 (C.C.A. 2, 1920) this change in status was permitted between judgment and appeal in a suit involving illegal manufacture, and that case is still the controlling law. In this very action, Judge Dawson recognized the *Ricordi* principle when he ruled that the injunction against Krug would be lifted and his recording materials returned to him whenever he filed the requisite notice and paid the royalties due. *Miller* v. *Goody, supra.* Had there been no consent decree, and had Krug subsequently become a compulsory licensee, the records sold by defendants herein would have lost their status as infringing records. Indeed, by the terms of plaintiffs' own argument, had Krug filed notice and not paid the royalties, the records would still have lost infringing status at least to the extent that the only protection against them would then be that accorded under the mechanical reproduction sections and limited to recovery from the manufacturer. It is difficult to believe that Congress intended to hinge such huge differences in consequence on a paper distinction; moreover, Congress could hardly have intended to create a seller's liability totally dependent on the manufacturer's surface intent. It would be illogical to rule that a seller may at any time be sued as an infringer when he has no control over the status of the records involved. The copyright law must be read to have general application, and if it had been intended ever to apply to a non-manufacturing seller it would provide, as a matter of good drafting, for a set point in time when the seller does become liable, and set conditions for suit would be prescribed which would not rest wholly upon the actions of others. Clearly, the type of liability formula necessary is one which would have to be devised by the legislature, not imposed on an ad hoc basis by the judiciary, and to

impose liability against sellers generally without some such formula would be contrary to Congress' clear purpose to impose primary [if not sole] liability upon the manufacturer of infringing records.

Even more basic to the argument against plaintiffs' interpretation is that their construction makes the whole royalty-treble royalty, limited recovery scheme meaningless. According to plaintiffs' construction, the proprietor may recover royalties and damages from the infringing manufacturer, and then minimum damages or actual damages from any distributors of the infringing records, no matter how innocent their intent. This is basically the protection accorded against copying under the copyright law; had this been intended, Congress would merely have called a recording a copy and simplified its problem, or it would have provided for compulsory licensing and then said that recording without a license would be penalized as is ordinary infringement. The additional punitive clauses in Sections 1(e) and 101(e) would have been unnecessary. This line of reasoning finds further support in the fact that the words "manufacture, use or sale" appear in the same phrase; therefore, if the infringing seller is liable under Section 101(b), so also is the infringing manufacturer, and the penalty provisions of Section 101(e) either become meaningless or give to the musical copyright proprietor a greater choice in his type of recovery than is given to any other copyright holder. Such a conclusion would be wholly inconsistent with the legislative purpose of giving only limited rights against mechanical reproduction of music.

The basic unsoundness of plaintiffs' position is also demonstrated by the fact that for over forty years the musical industry operated on the assumption that the $250 minimum penalty clause was not applicable to mechanical reproduction of music. Perhaps a brief statement of the historical background of the industry may explain why the

instant contention is now being pressed with such tenacity. The plaintiffs' present position is being pursued as part of a general campaign on the part of copyright proprietors, legitimate recording companies, and musicians' and performers' organizations to drive record pirates out of business. This drive received impetus, when with the advent of long-play records, the record pirates, who had hitherto confined their operations largely to old records not recently re-released by the major companies, began to dub recordings of current hits and to invade the entire record market on a large scale. In January of 1952, as part of that campaign, Columbia Record Company and Louis Armstrong joined in a suit against one of the major record pirates, Paradox Industries, Inc., and its president, Dante Bollentino. This company, which sold its records under the "Jolly Roger" label, had dubbed many recent recordings made by Armstrong for Columbia. The Columbia suit was based on unfair competition and on invasion of Armstrong's right of privacy. The litigation ended in a consent decree which enjoined the defendants from dubbing plaintiffs' records and ordered that records and masters of plaintiffs' items be delivered up for destruction. The defendants were also enjoined from using Armstrong's name and picture without permission, and Armstrong received $1,000 in damages.

Although the settlement seemingly produced a favorable reaction in that the record pirates started to run for cover, the music industry was not quite satisfied with the decree. See Note, *Piracy on Records, supra.* Part of their dissatisfaction might well have stemmed from the fact that the settlement decree still created no precedent in a legally foggy area, and it was thought by many that the strongest pressure could be brought to bear against the pirates via the copyright act. Accordingly, four music publishing houses brought suit against Paradox and Bollentino alleging infringement of various musical copy-

rights held by them in that the defendants had recorded the selections without filing notice or paying the copyright fees. The defendants were already out of operations as a result of the Columbia consent decree, and they both defaulted; their attorney wrote to plaintiffs' attorneys that any victory would be pyrrhic. The plaintiffs had sued under the theory pressed here, *i. e.* that they were entitled to $250 per infringement.[10] Their brief in that case, which I have examined, nowhere indicated that there might be a difficult statutory interpretation problem as to whether the minimum penalty clause was applicable to recordings, and, there being no answering brief or argument, the default decree was entered as requested.[11] This default

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[10] They sued for this minimum amount not only because of the difficulty of proving the number of illegal records made, but because one of the reasons the pirates often did not bother to qualify under the copyright act was their belief that the minimum penalty clause was not applicable to mechanical reproductions. Since the usual number of pressings of each bootlegged record was 750 to 1,000, this meant that at the statutory 2 cent royalty rate the proprietors would receive $15. or $20. recovery per infringement, and the treble damage provisions would not even bring the rate up to $100. per infringement.

Piracy on Records, supra. Even though the copyright act provides for recovery of costs and reasonable counsel fees in cases arising under the mechanical reproduction provisions, there are other expenses in time and effort beyond the allowable counsel fees which made it impracticable for copyright proprietors to bring suit for such a small sum, so the pirates scoffed at the law with impunity

[11] Actually four companion cases were brought by the different publishing companies involved, although only one brief was submitted for all. Default was entered in *Robbins Music Corp.* v *Paradox Industries, Inc.* and *Dante Bollentino*, Civ. 75-18, *Leo Feist, Inc.* v. *Same*, Civ. 75-15, *Mills Music, Inc.* v. *Same*, Civ 75-16, *Shapiro, Bernstein & Co., Inc.* v. *Same*, Civ. 75-17. All decrees were entered in the Southern District of New York, June 5, 1952, per E. A. Conger, D.J. The attorneys who represented the publishers in that litigation are acting in the same capacity in the present case. Their brief then, as here, cited many cases which have held that every copyright infringement entitles the proprietor

decree represented the sole occasion that the $250 minimum penalty had been applied to mechanical reproduction cases, and under the circumstances leading to its rendition, it cannot be considered as authority for plaintiffs' contentions as these contentions were never aired or contested. It must be emphasized that in the instant case, plaintiffs seek to extend this penalty to non-manufacturing sellers, a group on which Congress did not impose any duties under the mechanical reproduction provisions.

I have reached my decision in this matter with reluctance, but the conclusion is one from which I cannot escape. The inequities and inadequacies of the present law cry out for correction. It is scant comfort to the publisher plaintiffs herein to be told that although their plight is distressing, there are others in the industry, notably recording companies and talented performers, who at present receive even less protection from record pirates and those who distribute their wares. It is equally harsh to tell them that their remedy lies in the legislatures when the problems of the recording industry have been before various legislative bodies over the years, and the conflicting interests involved have prevented any solution. But I cannot innovate at pleasure in the name of justice nor is it proper for me to roam at will in the face of legislative restraint in pursuit of what I consider to be the

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[11] *Continued*.

to the $250. minimum penalty, that innocence of the infringer is no excuse, and that the copyright certificate is prima facie evidence that the selection involved is protected by that law. These cases are irrelevant though to the question of whether manufacture or sale of recordings of musical selections is to be considered infringement under the general terms of the statute or is to be treated as a separate problem. Although plaintiffs' attorneys ably argued and briefed that question in the present case, they were unable to present a single case or legal commentary favorable to their contention other than the four companion cases, supra, where default was entered, and this problem was never raised.

ideal. Where the legislative mandate is clear, as is the case here, judges are bound to follow the law scrupulously regardless of personal preference, and the rule of strict adherence to the statute is never so necessary as where the legislature has established what it considered to be a comprehensive regulatory scheme as it did in the case of mechanical reproduction of music. For a judge to attempt to qualify or amplify the rights Congress delineated in such detail would be both imprudent and improper. In this regard, the words of Judge Learned Hand in *RCA Manufacturing Co.* v. *Whiteman,* 114 F. 2d 86, 90 (C.C.A. 2) cert. denied, 311 U. S. 712 (1940), bear repetition.

> "We are adjured that courts must adjust themselves to new conditions, and that in the case at bar justice clearly points the way to some relief. We cannot agree; no doubt we should be jealous to execute all reasonable implications of established doctrines; but we should be equally jealous not to undertake the composition of substantial conflicts of interests, between which neither the common law, nor the statute, has given any clue to its preference. We cannot know how Congress would solve this issue; we can guess—and our guess is that it would refuse relief as we are refusing it—but if our guess were the opposite, we should have no right to enforce it."

In the present case, the best that can be said for plaintiffs' position is that Congress has not considered this problem and the worst, that Congress has considered this problem and has decided against the plaintiffs' position. Under either interpretation of legislative history, the hands of the judiciary are tied. The plaintiffs' motion for summary judgment in the sum of $250 per infringement from each defendant must, therefore, be denied.

Appendix C

Defendants have cross-moved for summary judgment in their favor against the publisher plaintiffs dismissing their complaint. Since the publishers allege unfair trade practices and unfair competition as well as copyright infringement, it must be determined whether they may maintain such a cause of action here. The musical selections involved have been published; such publication was a dedication to the public and put an end to common law copyright protection. In the absence of the copyright law, therefore, all persons would be free to copy the compositions in question. This being so, in the absence of statute, it would not be unfair competition either to copy the compositions or to reproduce them in sound; any other conclusion would deprive the theory of dedication to the public of any meaning. Thus the copyright law becomes the sole measure of protection available to a composer of a published work, and this protection depends on the terms of the statute itself. See Nimmer, *Copyright Publication, supra.* That this rationale gives a record manufacturer the opportunity to profit from a composer's skill without paying therefor was pointed out clearly by Justice Holmes concurring in the *Apollo* case, *supra*, but the fact that the manufacturer is getting something for nothing does not make his actions illegal. And the same holds true with the distributor of his products. I find, therefore, that the copyright proprietors have no common law rights against the defendants which can be asserted here.[12]

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[12] As pointed out in Note [6] *infra*, there is a distinction between the possible common law rights of performers and recording companies as to whom Congress has not legislated, and the rights of those who hold the copyrights on published musical compositions. So long as the publishers base their claims on injury to the copyrights they hold, their remedy must be sought under the statute.

Under these circumstances, the motion of the defendants must be granted, and the publisher plaintiffs' complaint must be dismissed. So ordered.

Dated: New York, N. Y. March 16, 1956.

IRVING R. KAUFMAN,
U. S. D. J.

Judgment entered:

WILLIAM J. CONNELL
Clerk

3/16/56.

Office - Supreme Court, U.S.
FILED
JAN 25 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 677

SAM GOODY,

Petitioner,

against

SHAPIRO, BERNSTEIN & CO., INC., GERSHWIN PUBLISHING CORPORATION, EDWARD B. MARKS MUSIC CORPORATION, MILLER MUSIC CORPORATION, LEWIS MUSIC PUBLISHING COMPANY, INC. and MUTUAL MUSIC SOCIETY, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Appendix C 20-34)[1] is reported in 248 F. 2d 260.

The opinion of the United States District Court for the Southern District of New York (Appendix C 35-58) is reported in 139 F. Supp. 176.

[1] Appendix references are to Appendices A-C of the petition.

Jurisdiction

The judgment of the Court of Appeals was made and entered on September 28, 1957 (Appendix A 14).

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. Section 1254 (1)

Statute Involved

Sections 1(a), 1(e) and 101(e) of the Copyright Act of March 4, 1909, c. 320, Title 17, U.S.C., (35 Stat. 1075, *et seq.*), as codified and enacted into positive law by the Act of July 30, 1947, c. 391 (61 Stat. 652). Sections 1(e) and 101(e) are contained in Appendix B (15, 16, 18, 19). Section 1(a) which has been omitted from the petition, together with the heading of section 1, reads as follows:

"§ 1 Exclusive Rights As To Coyprighted Works.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exeusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work;" (Subsections (b) to (e) inclusive, setting forth such additional exclusive rights, follow subsection (a)).

Question Presented

Accurately stated the question is whether, in that part of section 101(e) reading "then in case of infringem nt of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts", the word "sale" should be deemed superfluous and accorded no significance, thereby absolving the non-manufacturing seller of liability for the sale of infringing parts (records).

Statement of the Case

The petitioner, Sam Goody, operates a large retail store for the sale of phonograph records and related merchandise at "cut rate" prices, such operation being conducted by him on a very substantial scale (R. 64, 111, 112).[2]

Each of respondents is one of the leading music publishers in the United States, and each of the musical compositions the subject of the action is one of the principal compositions in their respective catalogues (R. 64). The causes of action of respondents against petitioner (R. 11-46) are for the infringement of their respective musical copyrights by his sale of parts of instruments (phonograph records) serving to reproduce mechanically such copyrighted compositions, the manufacture, use or sale of which parts was unauthorized, either by respondents or under the compulsory license provision of Sec. 1(e) of the Act. They were manufactured and sold by a procedure known in the trade as "bootlegging" (R. 65).

This action was instituted at the instance of one Harry Fox, in his capacity as the exclusive agent and trustee for over 300 of the leading music publishers in the United States in the licensing of the right to manufacture and sell legitimate phonograph records serving to reproduce their copyrighted musical compositions, and in the prosecution of actions for the unauthorized and illegal manufacture and sale of records serving to reproduce such compositions, including by "bootlegging".

Such "bootlegging" is perpetrated either (1) by making an unauthorized master recording from a legitimate record and then making copies therefrom, or (2), as in the instant case, by making an unauthorized off-the-air recording of the radio or television performance of a musical composi-

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[2] Record references are to the Plaintiffs-Appellants' Appendix below, no other appendix having been filed.

tion by a famous artist, of which a prior authorized recording had been made and a public demand created by the legitimate manufacturer and dealers. In either case the costs and charges of the artist, musicians, recording personnel, union, overhead, advertising, and royalty payments to the music publishers and authors, are thereby eliminated. Such records are then sold to unscrupulous dealers at a substantially lower price than the legitimate records. The "bootleg" records are then palmed off on the public by such dealers specializing in this type of operation, bearing the same marked price as the legitimate records, at a reduced price in direct competition with and as a substitute for the authorized records (R. 65).

The "bootleg" records in the instant case were made from off-the-air recordings of radio broadcasts of one Glenn Miller, an outstanding orchestra leader, and orchestra. They were manufactured and sold as a substitute for records of the legitimate recordings made by Glenn Miller and orchestra for R.C.A. Victor; it being known in the trade that the only legitimate records were those of R.C.A. Victor (R. 69, 70).

It is the invariable practice of every legitimate record manufacturer to print on the record label both the trade name of the manufacturer and the trade mark by which his product is known to the trade, and to likewise print on the record label or jacket or both the full name and address of the manufacturer. However, on the labels and jackets of these records there is merely printed the legend "An A.F.N. Presentation" (coined only for these records) and neither the name nor address of the manufacturer appears on either the record label or the jacket. This is an infallible earmark of a "bootleg" record (R. 66).

The manufacturer of the "bootleg" records is invariably an irresponsible individual with no business address. In instances where service of process may be effected upon him, he nevertheless continues to flood the market with

the same records under different specially coined names, through the same dealers. Accordingly, the only recourse of the legitimate record manufacturer and dealers and the music publishers to curtail a condition, which is rapidly mushrooming into a serious threat to their mutual interests, is to proceed against the dealers who are primarily responsible for the success of this illegal operation (R. 67, 68).

After an extensive investigation it was ascertained that the "bootleg" records in the instant case were being manufactured by one Joseph Krug. Having failed to obey an order and subpoena of the District Court, he was taken into custody of the United States marshal and lodged in jail, pending the hearing of a motion to punish him for contempt. He later appeared before a special master and gave testimony that he had recently been in the employ of an automobile repair shop; that he had no business cards, stationery or bill heads; that he had no place of business or employees and no telephone listing; that the records were manufactured for him in New Jersey and delivered by him in person to petitioner; that petitioner knew he was not a record manufacturer; that he never furnished and was not called upon to furnish petitioner with a statement of the records sold him; that none of the receipts from petitioner therefor were deposited; that in most instances such payments were made in cash and when made by check it was cashed for him; that if a receipt was requested for such cash payments he used a rubber stamp on a blank form of receipt; and that such records were listed by petitioner at the same price as the legitimate records and then offered for sale by him at approximately half the list price (R. 71, 72). Petitioner concedes that "He made no specific inquiry of Krug with reference to the statute". (Petition 3)[3]

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[3] Petition references are to the instant petition.

The District Court said in its opinion that it was not "moved by defendants' protestation of innocent intent" as the foregoing factors "were clear indications that he [Krug] was a record pirate" (R. 190, 191).

In the answer of petitioner it is admitted that he continued to sell the "bootleg" records, even after written notice that the sale thereof was unauthorized and illegal (R. 62).

ARGUMENT

A.

The petition for a writ is in the sole interest of petitioner and a nominal number of other dealers likewise trafficking in "bootleg" records, in an attempt to legalize their unlawful conduct under the guise of a construction of the statute.

Petitioner refers to the comment of the Court of Appeals, that this is the first time that the courts have been called upon to construe the pertinent provisions of the statute (Petition 5). As copyright infringement in the sale of "bootleg" records is only a recent occurrence in the industry, there had been no occasion until shortly prior to the institution of this action to seek redress therefor. Furthermore, in all other instances, where suit has since been brought, the liability of the dealer under the clear wording of Section 101(e) has never previously been questioned (R. 67, 68).

When petitioner speaks of the importance to a "growing industry" of a construction by this Court of the statute, he obviously can only have reference to that growing segment of the industry trafficking in "bootleg" records (Petition 5).

B.

Petitioner's entire argument is predicated upon the false premise that the only exclusive right and protection accorded a copyright proprietor is in the "manufacture" of records.

Petitioner would contend that the only exclusive statutory right the copyright proprietor acquires and can enforce is that of manufacture; and that the Court of Appeals erroneously interpreted the statute to comprehend "make, use and vend" (Petition 9, 10).

The prior act, section 4952 (c. 3, Rev. Stat., Title 60), gave the "author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition * * * the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same".

In *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U. S. 1, 28 Sup. Ct. 319, this Court said with respect to the prior act (pp. 16, 18):

> "When we turn to the consideration of the act it seems evident that Congress has dealt with the tangible thing, a copy of which is required to be filed with the Librarian of Congress, and wherever the words are used (copy or copies) they seem to refer to the term in its ordinary sense of indicating reproduction or duplication of the original."
>
> * * * * *
>
> "As the act of Congress now stands we believe it does not include these records as copies or publications of the copyrighted music involved in these cases."

The foregoing determination of this Court brought about the amendment of the act, by the enactment of sections 1(e) and 101(e) in their present form.

Section 1 provides that "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:" (each of which exclusive rights is then set forth in subsections (a) to (e) inclusive following). Under subsection (a) such exclusive right comprehends to "vend the copyrighted work". Then under subsection (e) such exclusive right to "vend" is specifically made applicable to phonograph records by the provision "for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced." To support his argument that the exclusive rights granted a copyright proprietor under subsection (e) do not include the right to "vend", petitioner necessarily avoids all reference to subsection (a).

The only limitations in subdivision (e), upon the extent of the exclusive rights granted under "the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work", are that they shall include only compositions published after July 1, 1909, and shall not include the work of a foreign author or composer except under certain conditions. This confirms that such right of control is inclusive of the right to make, use and "vend".

Furthermore, subsection (e) provides that the payment of the royalty therein provided shall free the articles or devices for which such royalty has been paid from "further contribution to the copyright except in case of public performance for profit". This again confirms that such right of control is inclusive of the right to make, use and "vend".

C.

Section 1(e) relates to the obligations of a "manufacturer" to the "copyright proprietor" under the compulsory license provisions thereof, while section 101(e) relates to the remedies accorded a "plaintiff" in an action of infringement for the "unauthorized manufacture, use, or sale" of records.

Section 1(e) contains what is referred to in section 101(e) as the "compulsory license provision of this title". This provision relates solely to the royalty payments and accounting to be made by a "manufacturer", who relies upon such provision in the absence of a license from the copyright proprietor. It provides that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce the same mechanically, any other person may make similar use upon payment to the "copyright proprietor" of a royalty of 2 cents on each such part "manufactured", to be paid by the "manufacturer" thereof; that the "copyright proprietor" may require, and if so the "manufacturer" shall furnish a report under oath monthly of the parts manufactured during the previous month, at which time the royalties therefor shall be payable; and that in case of failure of the "manufacturer" to pay to the "copyright proprietor" the royalties due after written demand he may be liable for an additional sum not exceeding three times such amount.

Accordingly, section 1(e) provides only for the royalties to be paid and the reports to be furnished to the "copyright proprietor" by the "manufacturer" who has relied upon the compulsory license provision. It has no application whatever to an infringement of a copyright by the "unauthorized manufacture, use, or sale" (section 101(e)) of such parts over which the "copyright proprietor" is given as aforesaid the exclusive right of control.

On the other hand, section 101(e) makes provision for the remedies of "the plaintiff", in an action brought by the copyright proprietor for the infringement of his exclusive right to manufacture, use and vend. Accordingly, while the phraseology employed in section 1(e) relates to the rights and obligations of a "manufacturer" to the "copyright proprietor" under the compulsory license provision thereof, the phraseology employed under section 101(e) relates to the remedies accorded a "plaintiff" in an action of infringement for the unauthorized "manufacture, use, or sale" of such parts. In this respect 101(e) provides that whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon parts serving to reproduce the same mechanically, "then in case of infringement of such copyright by the unauthorized manufacture, use, or sale" of such parts, an injunction may be granted upon such terms as the court may impose and the "plaintiff shall be entitled to recover" in lieu of profits and damages the royalty provided.

Petitioner concedes that upon the enactment of section 1(e) Congress then added section 101(e) to provide for "additional remedies of the copyright owner" (Petition 10) whereby the "phraseology used in the compulsory licensing provisions of section 1(e) differs from that used in the implementing provisions of section 101(e)" (Petition 7).

Section 101(e) further provides "that whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments" serving to reproduce the same mechanically, "relying upon the compulsory license provisions of this title, he shall serve notice of such intention" and send a duplicate to the Copyright Office.

Upon a manufacturer evidencing "such intention", as aforesaid, he becomes a licensee with respect to all records thereafter manufactured under the compulsory license.

Any subsequent failure on his part to make the royalty payments, for the records manufactured under the license could not possibly constitute the "manufacture, use, or sale" thereof an infringement. However, in the absence of a license agreement, or the service of notice of such intention, then the "manufacture, use, or sale" is unauthorized and constitutes an infringement under the provision of section 101(e).

D.

The deliberate employment by Congress of the clear and concise wording, "unauthorized manufacture, use, or sale" as constituting an infringement, cannot possibly be construed as signifying an intent to limit infringement to the sole act of manufacture.

Petitioner says "Both the District Court and the Court of Appeals recognized the ambiguities in the statute" (Petition 8).

On the contrary, the Court of Appeals said that "A natural reading of these sections leads us to the conclusion that a seller of unauthorized records of copyrighted music, although having no connection with the manufacturer, is an infringer and liable for damages which the Act provides."; that "section 101(e) clearly classifies the sale of unauthorized records as an infringement"; and that "our interpretation accords significance and effect to all the words of the statute. Ex parte Public Bank, 278 U. S. 101, 104." (Appendix C 26-28.)

Furthermore, the District Court recognized that section 101(e) "does not specifically limit that right to recover from the manufacturer" and that any "adverse ruling will deprive the phrase 'manufacture, use or sale' of any meaning" (R 197, 198).

As this Court said in *Ex Parte Public Bank, supra* (p. 104), 49 Sup. Ct. 43:

> "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' *Market Co.* v. *Hoffman*, 101 U. S. 112, 155."

In *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 475, 31 Sup. Ct. 265, this court said:

> "The words 'or different,' looking at the context, cannot be regarded as superfluous or meaningless. We must have regard to all the words used by Congress, and as far as possible give effect to them. Market v. Hoffman, 101 U. S. 112, 115."

Likewise, in *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 278, 49 Sup. Ct. 133, this Court said:

> "Construction may not be substituted for legislation [and where it] does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended."

In *Moore* v. *United States*, 249 U. S. 487, 489, 39 Sup. Ct. 322, this Court said quoting from *United States* v. *Temple*, 105 U. S. 97, 99, that the statute must be read "according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation."

In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 392, 60 Sup. Ct. 907, this Court said that if possible, a stat-

ute will always be given that construction "which will preserve the vitality of the Act and the utility of the language in question."

In *United States* v. *Powers*, 307 U. S. 214, 217, 59 Sup. Ct. 805, this Court said quoting from *Bird* v. *United States*, 187 U. S. 118, 124, that there is a presumption "against a construction which would render a statute ineffective or inefficient."

In *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 258, 65 Sup. Ct. 605, this Court said that a statute should not be construed "by reading out of its purview the only means for making it effective."

In *Washingtonian Co.* v. *Pearson*, 306 U. S. 30, 36, 59 Sup. Ct. 397, this Court said with respect to the 1909 amendment which added sections 1(e) and 101(e):

> "The Act of 1909 is a complete revision of the copyright laws, different from the earlier Act both in scheme and language. It introduced many changes and was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; 'to afford greater encouragement to the production of literary works of lasting benefit to the world.'"

E.

The definition of an infringement in Section 101(e) of the Copyright Act is the same as in Section 271(a) of the Patent Act under which it has been uniformly held that the non-manufacturing seller of an infringing device is an infringer.

Petitioner concedes that the wording "unauthorized manufacture, use, or sale" as constituting an infringement was patterned after the Patent Act (Petition 11, note 17).

Section 101(e) of the Copyright Act provides that "in case of an infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts," et cetera.

Section 271(a) of the Patent Act (Act of July 19, 1952, c. 950, U.S.C., Title 35, 66 Stat. 811) likewise provides that "Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention within the United States during the terms of the patent thereof, infringes the patent." This section is a codification of section 40 (Rev. Stat. Sec. 4884, U.S.C. Title 35) and section 70 (Rev. Stat. Sec. 4921, U.S.C. Title 35).

Section 40 provided that every patent shall contain a grant "of the exclusive right to make, use, and vend the invention, or discovery." Section 70 provided that the courts vested with jurisdiction shall have power "to prevent the violation of any right secured by patent" and "upon a decree being rendered in any such case for an infringement" to make an award.

In *Walker On Patents*, Deller's Edition, Vol. III, Sec. 450, page 1681, speaking of former sections 40 and 70, it is said:

> "An infringement is the unauthorized making or using or selling of the patented invention. Christensen v. Nat. Brake & Elect. Co., 18 F. 2d 981; George Close Co. v. Ideal Wrapping Machine Co., 29 F. 2d 533, 535, C.C.A.I. (1928)."

In *George Close Co.* v. *Ideal Wrapping Machine Co.*, *supra* (p. 535), the Court said that an infringement of a patent is "a breach of the right to make, to use, or to vend."

In *J. R. Clarke Co.* v. *Murray Metal Products Co.*, 219 F. 2d 313 (Cir. 5), decided 1955 subsequent to the enactment of Section 271, the cause of action against defendant

was for the sale of an infringing device, which it had acquired from the manufacturer. The Court said (p. 315):

> "The failure to join the manufacturer of the accused device as a party defendant in this suit is not material in view of appellant's option under 35 U.S.C. § 271 to charge with infringement 'whoever without authority *makes, uses or sells* any patented invention,' etc." (Emphasis that of Court.)

In *Bauer & Cie* v. *O'Donnell*, 229 U. S. 1, 13, 33 Sup. Ct. 616, this Court in comparing the copyright statute to the patent statute said:

> "Protection in the exclusive right to sell is aimed at in both instances, and the terms used in the statutes are to all intents the same."

In *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 402, 405, 60 Sup. Ct. 681, this Court said:

> "The analogy found in cases of patent infringement is persuasive."
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> • • • • •
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> "We see no reason why these principles should not be applied in copyright cases."

In *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U. S. 182, 190, 30 Sup. Ct. 38, this Court, in holding that the accepted construction of a provision in the patent law was controlling with respect to a like provision in the copyright law, said:

> "We think the same principle, in this aspect, controls, as in the case of a patent."

In *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 158, 68 Sup. Ct. 915, this Court held adversely to the construction of the Copyright Act for which the defendants contended, as being "in violation of the principle of the patent cases."

F.

Intention to infringe is not essential. A dealer in records has a ready and infallible means of ascertaining if they are an infringement, which factor is not applicable to a dealer in any other type of copyright material.

The District Court said petitioner was aware that the manufacturer in the instant case (Krug) was a record pirate (R. 190, 191). A dealer, having records offered to him for resale by one whose responsibility is questionable, can very readily require such party to exhibit a license or, in the absence thereof, of a certificate from the Register of Copyrights of the filing under section 101(e) of the required notice of his intention to make such use. Petitioner concedes that he never even made an inquiry of Krug regarding his authorization (Petition 3).

With such means of definitely ascertaining if the manufacture is authorized, a record dealer can never be deemed an innocent infringer. There are no means available to a dealer in any other type of copyright material of ascertaining if it is an infringement. Yet, in *Woolworth Co.* v. *Contemporary Arts*, 344 U. S. 228, 73 Sup. Ct. 222, involving the infringement of a copyright on a statue, although the defendant, a dealer, was an innocent infringer with gross profits of only $899.16, this Court affirmed an award of $5,000 against it saying (p. 233):

> "The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct."

For as this Court had said in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191, 51 Sup. Ct. 410, speaking of the Copyright Act:

"Intention to infringe is not essential under the Act. Compare Hein v. Harris, 175 Fed. 875, affirmed 183 Fed. 107; Stern v. Remick & Co., 175 Fed. 282; Haas v. Leo Feist, Inc., 234 Fed. 105; M. Witmark & Sons v. Calloway, 22 F. (2d) 412, 414."

And as is said in *Drone On Copyright* (p. 404):

"If innocent motives or ignorance could be successfully pleaded as a defence to a charge of infringement, the protection intended for literary property would be wholly inadequate. The injury done to an author by an unlicensed use of his work is none the less when the appropriation has been made without a bad intention, or through ignorance. Hence, the remedy should be not less complete."

Petitioner's principal argument (Petition 12) is based upon the contention that the infringing manufacturer may at any time, even after judgment, comply with the compulsory license provisions of the Act and pay the back royalties, thereby freeing the records theretofore manufactured from their infringing status. Accordingly, says petitioner, the liability of the seller should not be predicated upon such a contingency. In support of this contention petitioner cites *G. Ricordi & Co.* v. *Columbia Graphophone Co.*, 263 Fed. 354 (Cir. 2).

Petitioner advanced the same argument in the Court of Appeals based upon its alleged determination in the *Ricordi* case to such effect. However, the Court of Appeals unequivocally disavowed such a determination, saying such "argument misconceives the holding in the *Ricordi* case", as it was a far cry from holding that such "payment exonerates any and all prior infringers from liability already incurred" (Appendix C 27, 28).

CONCLUSION

As the Court of Appeals said, "Section 101(e) clearly classifies the sale of unauthorized records as an infringement". The petition should be denied.

Respectfully submitted,

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